Discussion Paper on the *Statute of Frauds*, 1677

NEWFOUNDLAND LAW REFORM COMMISSION

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CHAIRMAN'S PREFACE

The *Statute of Frauds,* 1677 forms part of the law of Newfoundland not by virtue of express enactment of our legislature but rather by operation of the doctrine of reception. This gives rise to a number of difficulties, among them the inconvenience, and sometimes confusion, associated with not having the statute easily accessible on the statute books of the Province. The Law Reform Comission has received a number of submissions from the Province's Bench and Bar adverting to this and other more substantive difficulties relating to the *Statute's* operation. The Commission has been asked to review the *Statute* and to determine which of its provisions, if any, remain relevant to contemporary conditions.

This *Discussion Paper,* prepared for the Commission by Professor Joseph T. Robertson, Ludlow Hall, University of New Brunswick, is the first step in the process of evaluation and reform. The goal was to produce a *Discussion Paper* which would provide a relatively detailed description of the operation of the *Statute* as seen through the case law and periodical literature it has generated and to evaluate its operation.

The *Discussion Paper* is intended to achieve a number of aims. The first aim is to provide a resource document which will lay the foundation for the Commission's future work in this area. Because the *Statute* has worked its way into the interstices of our legal system in complex ways, it is necessary to be clear as to what its effects have been before determining how it should be disposed.

A second aim is to make the results of the research done for the Commission available to all interested parties. The *Discussion Paper* should be of especial interest to the Province's legal and business communities. If it serves to generate informed discussion, much will have been achieved. We invite all those who have suggestions or comment respecting the views expressed in the *Discussion Paper* and/or future reform of the *Statute* to contact the Commission. It would be appreciated if those intending to comment would do so in writing.

While this *Discussion Paper* was prepared at the Commission's request, the conclusions and suggestions for reform which it contains are those of the author. It should not be regarded as an expression of the formal views of the Law Reform Commission.

We would like to thank Professor Robertson for this thoughtful, and in places provocative, work.

J. Derek Green, Q.C.
Chairman
Newfoundland Law Reform Commission

AUTHOR'S PREFACE AND ACKNOWLEDGEMENTS

In April of 1990, the Commission asked that I prepare a Discussion Paper on the *Statute of Frauds* of 1677 and the *Amendment Act* of 1828. Both statutes form part of the Province's received law, except to the extent that a provision has been repealed by superseding legislation. It was agreed that the analysis would focus primarily on the writing requirement prescribed by section 4 (the contracts provision) because of its practical significance. Accordingly, detailed treatment was not accorded all sections of the Statutes and, in particular, those which simply remain as archaisms. Interestingly enough, it was not the contracts section which proved problematic when formulating reform recommendations. Rather the conveyancing provisions, sections 1 to 3 of the 1677 Statute raised several significant issues, not all of which are amenable to immediate reform solutions.

Gratitude must be expressed for the initial research efforts of Katherine Bredin and Glenda Savory. Though I have never met either researcher, they undertook, on behalf of the Commission, the tedious task of compiling relevant literature and materials. Their thoroughness facilitated greatly the preparation of the Discussion Paper. The same accolade is deserving of my own student researcher, Dufferin Harper. I am also grateful to colleagues Margaret McCallum and John Williamson, who responded faithfully to any and all queries. Finally, I would like to thank Christopher Curran, the Commission's Executive Director, for his patience and cooperation over the past eight months.

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CHAPTER 1

INTRODUCTION

The diversity and intensity of criticisms levelled at the *Statute of Frauds*[1] since its enactment in 1677, coupled with the fact that it remains a topic of law reform at the end of the 20th century, attest to both its resilience and the failure of reformists and legislators to agree on its proper fate. Entitled *An Act for Prevention of Frauds and Perjuries*, it became part of the law of virtually every common law jurisdiction, whether by reception or express adoption, in whole or in part. Throughout the last two centuries, it has been decried as an anachronism and uniformally denounced by commentators on both sides of the Atlantic.[2] Sir Frederick Pollock's satirical tribute to the Statute on the occasion of its two hundred and fiftieth anniversary has not been bettered:[3]

> Perhaps it is not inopportune to suggest that a dinner in [the Statute's] honour be given in one of the Inns of Court. A suitable number of litigants, who have been cheated of their rights by means of this interesting and aged Statute, might be invited to give relish to the affair. If some of the defendants who have sheltered themselves behind its useful provisions are also asked, care will have to be taken that none of the silver disappears. The toasts of the evening will be 'The Law - may it never be reformed' and 'Floreat iniustitia.'

Of course, Pollock's criticism is directed principally at section 4 of the Statute which imposes a writing requirement with respect to enforcement of specific contracts, particularly those concerning land. However, the Statute's objectives are not restricted to the imposition of writing formalities and in fact many of its twenty-five sections were aimed at effecting substantive changes in the law of the late 17th century. Though the sections of the Statute are wide-ranging, they can be conveniently grouped as follows:

(1)*The Conveyancing Provisions* - Sections 1, 2 and 3 of the Statute impose a writing requirement in regard to conveyances of freehold and leasehold estates in land as well as interests therein;

(2)*The Contracts Provisions* - Sections 4 and 17 impose a writing requirement in regard to certain contracts. Section 4 embraces five distinct contractual settings but is best known for that dealing with land. Section 17 pertains to contracts for the sale of goods;

(3)*The Trusts of Land Provisions* - Sections 7, 8 and 9 impose a writing requirement with respect to creation and assignment of trusts of land;

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1 29 Car. II, c.3 (hereafter the Statute or the 1677 Statute).
2 See Appendix to discussion Paper which lists the relevant literature.
3 F.P., Notes (1927) 43 L.Q.R.1.

(4)*The Wills and Probate Provisions* - Section 5, 6, and 19 to 25 inclusive speak to matters concerning wills, probate and succession;

(5)*The Debtor and Creditor Provisions* - Sections 10 to 16 inclusive, and section 18 embrace, *inter alia*, the concept of exigibility in the context of land and the binding effect of judgments.

The United Kingdom Parliament effected amendments to the Statute in 1828 with the *Statute of Frauds Amendment Act* (Lord Tenterten's Act),[4] and again in 1856 with the *Mercantile Law Amendment Act*.[5] In time, many of the Territories of the British Empire would re-enact the *Statute of Frauds* while eliminating provisions deemed obsolete.

Newfoundland took an independent tack. Today, the Statute of 1677 remains in force as part of the received law of the Province, except to the extent that any of its provisions were inapplicable to local conditions[6] or have been implicitly repealed by superseding legislation. And the same holds true with respect to the amending legislation of 1828. However, the *Mercantile Law Amendment Act* of 1856 is not part of Newfoundland's received law though some of its provisions were subsequently enacted as amendments to the Province's *Limitation of Actions (Personal) and Guarantees Act*.[7] The cut-off date for the automatic reception in Newfoundland of Statutes of the Imperial Parliament is July 26, 1832, the date on which the Newfoundland legislature was established.[8]

This discussion paper focuses on the twenty-five sections of the 1677 Statute and the ten provisions in the *Amendment Act* of 1828. An obvious objective is to identify those sections which have been implicitly repealed by superseding legislation. For example, a number of sections found in the Statute of 1677 were re-enacted in Newfoundland as provisions of the *Wills Act*.[9] In some instances, there are substantive differences between a provision of the original Statute and that found in the later legislation. Such differences are noted. Ultimately, the discussion paper makes recommendations in regard to retaining or repealing the extant provisions of the 1677 and 1828 Statutes.

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4 9 Geo. IV, c.14.

5 19 & 20 Vict., c.97.

6 See Edward M. Archibald, Q.C., *Digest of the Laws of Newfoundland* (1847), Henry Winton; St. John's, Newfoundland, at p. 38. The *local-conditions* exception raises a number of interesting questions. There are no Newfoundland cases which state that the statute *in toto* has been received in Newfoundland. The cases that have dealt with the application of the Statute in Newfoundland have been directed at specific sections only, either by express declaration or by assumption as to application. Given the diverse nature of the subject matter dealt with by the statute, is it safe to make the leap in logic that because *one* section or some sections have been found to be applicable to local conditions, *all* sections of the Statute are likewise applicable? See also *infra* Ch. 6, n. 6, at 78.

7 R.S.N. 1970, c. 206. See also Newfoundland Law Reform Commission, *Working Paper on Limitation of Actions* (1985) NLRC-WP1, Appendix C at 380f. concordance between *Limitation of Actions (Personal) and Guarantees Act* and English legislation.

8 See *Buyers Furniture Limited* v. *Barney's Sales and Transport Limited and Downey* (1983), 43 Nfld. & P.E.I.R. (Nfld. C.A.) 158, at p.160 and E.M. Archibald, *supra*, n. 6 at 40.

9 R.S.N. 1970, c.401.

The simplest resolution of the problem identified, however, lies in the abrogation of both of the principal pieces of legislation. A general recommendation to repeal both Statutes in their entirety is inescapable. It is more difficult to offer recommendations for replacement legislation, including those instances in which a writing requirement should be retained.

Everyone knows that section 4 remains the most problematic and controversial section of the Statute. Thus, it is expected that attention focus on the case law generated by that section, the law of land contracts. At the same time, it must be acknowledged that the conveyancing sections of the Statute raise a number of correlative issues which cannot be ignored. Aside from these aspects of the Statute, it is not difficult to maintain that the majority of provisions presently in force in Newfoundland should be repealed. Indeed, the recommendations and analysis provided by other law reform agencies throughout the Commonwealth reveal that detailed treatment of many of the Statute's provisions is neither necessary nor illuminating. Prior examinations have been carried out by various Commonwealth law reform commissions[10] and those of the Provinces of British Columbia,[11] Alberta,[12] Manitoba[13] and, most recently, by Ontario.[14]

10 See; England, Law Revision Committee, Sixth Interim Report (Statute of Frauds and the Doctrine of Consideration-Cmd. 5449, Reprinted in (1937) 15 C.B.R. 585; Queensland Law Reform Commission, Q.L.R.C. 6, A Report of the Law Reform Commission on a Review of the Statute of Frauds (1970); and Law Reform Committee of South Australia, Thirty-fourth Report Relating to the Repeal of the Statute of Frauds and Cognate Enactments in South Australia (1975).

11 Law Reform Commission of British Columbia, Report No. 33, Report on the Statute of Frauds (1977).

12 Alberta Institute of Law Research and Reform, Background Paper No. 12, Statute of Frauds (1979); Alberta Institute of Law Research and Reform, Report No. 44, The Statute of Frauds and Related Legislation (1985).

13 Manitoba Law Reform Commission, Report No. 41, Report on the Statute of Frauds (1980).

14 Ontario Law Reform Commission, Report on Amendment Of The Law of Contract, Chapter 5 - Contractual Aspects of the Statute of Frauds (1987).

CHAPTER 2

THE CONTRACTS PROVISION - SECTION 4

> IV. And be it further enacted by the Authority aforesaid, That from and after the said four and twentieth Day of June no Action shall be brought whereby to charge any Executor or Administrator upon any special Promise, to answer Damages out of his own Estate; or whereby to charge the Defendant upon any special Promise to answer for the Debt, Default or Miscarriages of another Person; or to charge any Person upon any Agreement made upon Consideration of Marriage; or upon any contract or Sale of Lands, Tenements or Hereditaments, or any Interest in or concerning them; or upon any Agreement that is not to be performed within the Space of one Year from the making thereof; unless the Agreement upon which such Action shall be brought, or some *Memorandum* or Note thereof, shall be in Writing, and signed by the Party to be charged therewith, or some other Person thereunto by him lawfully authorized.

1. Introduction

Section 4 of the *Statute of Frauds* imposes a writing requirement with respect to enforcement of specified contracts and remains in force in the Province. Though the significance of some may be relegated to the annals of legal history, others continue to be the subject of a continuing debate amongst law reformers. One can identify each of the contractual categories embraced by section 4 in ascending order of relevance:

(1) Promise by Executor/Administrator to Answer For Damages Out of Own Estate;
(2) Agreements Made Upon Consideration of Marriage;
(3) Contracts Not to be Performed Within a Year of Making;
(4) Contracts To Answer For The Default, Debt or Miscarriage of Another (Guarantees); and
(5) Contracts For The Sale of Land or an Interest Therein.

Categories (1) and (2) can be dealt with summarily as they are recognized universally as archaisms. Category (3) lacks practical significance because of judicial interpretations and demands similar treatment. However, the remaining two categories require a sustained analysis. Admittedly, the writing requirement in the case of land contracts is often perceived to be more problematic when contrasted with that of guarantees.

The discussion paper will deal initially and summarily with categories (1) to (3). Thereafter, a preemptory recommendation to abrogate these provisions of section 4 will be offered. This should not attract criticism since every Commonwealth law reform agency has so recommended. Discussion, therefore, focuses on the remaining two categories. The analysis begins with an examination of the evidentiary matters relevant when determining whether

the writing requirement (a sufficient note or memorandum) has been satisfied. When faced with the failure of a party to a contract to meet that legal requirement courts developed exemptions from the statutory requirement. For example, in the event of non-compliance a plaintiff may invoke the doctrine of part performance to take the contract outside the ambit of the Statute. Equally, a petitioner might raise a restitutionary claim based on *quantum meruit*. These legal devices have enabled the Courts to provide relief against the rigours of the Statute and so demand attention.

While criticisms of the Statute are manifold and easy to describe, it is the search for the 'right' solution which has eluded reformers. The antithetical approaches taken in regard to retention of a writing requirement confirms that observation. Few have been willing to recommend abrogation, while others have been content to redefine the form of the writing requirement. This chapter, therefore, examines the purposes underlying the writing requirement, the allied criticisms, the reform positions proposed by various law reform bodies, as well as the author's recommendations.

2. Types Of Contracts Falling Within Section 4

A. Promise by Executor or Administrator to Answer For Damages Out of His or Her Own Estate

The rationale for a writing requirement for such promises, is best explained in a Background Paper prepared by Alberta's law reform agency: "[a]t the time of the enactment of the Statute of Frauds, the executor or administrator of an estate took beneficially if there was no residuary gift and the estate was not liable for the wrongful acts of the deceased. This placed moral pressure on the executor or administrator to make restitution out of his own funds, so that such special promises were common."[1] However, in most jurisdictions legislation has been introduced whereby personal representatives no longer have a claim to the residuary estate of the deceased.[2] The notion of personal representatives assuming financial responsibility for the liabilities of the deceased is not persuasive today as it was in the past. Thus, this aspect of section 4 was repealed in the United Kingdom,[3] New Zealand,[4] Western Australia,[5] British Columbia[6] and Manitoba,[7] while its repeal has been recommended in Queensland,[8] South Australia,[9] Alberta[10]

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1 Alberta Institute of Law Research and Reform, Background Paper No. 12, *Statute of Frauds (1977)*, at 128 (hereafter referred to as "Alberta Background Paper").
2 E.g., Wills Act, R.S.N.B. 1973, c. W-9, s. 35(1).
3 Law Reform (Enforcement of Contracts) Act, 1954, 2 & 3 Eliz. 2, c. 34, s. 1.
4 Contracts Enforcement Act 1956, Repr. Stat. N.Z., 1979, Vol. 1, at 535, s. 2.
5 Law Reform (Statute of Frauds) Act, West Austl. Acts 1962, No. 16, s. 2.
6 An Act For Prevention of Frauds, S.B.C. 1958, c. 18, s. 7.
7 An Act to Repeal The Statute of Frauds, S.M. 1982-83-84, c. 34.
8 Queensland Law Reform Commission, Q.L.R.C. 6, *"A Report of the Law Reform Commission on a Review of The Statute of Frauds* (1970) (hereafter referred to as "Queensland Report").
9 Law Reform Committee of South Australia, *Thirty-fourth Report Relating to the Repeal of the*

and Ontario.[11] Express repeal of this provision of section 4 of the Statute is recommended. However, that recommendation fails to address a fundamental problem. It would appear that Newfoundland has not abolished the rule with respect to personal representatives having a claim to the residuary estate of the deceased. It is recommended that the *Wills Act*[12] be amended accordingly.

B. Agreements Made Upon Consideration of Marriage

In the 17th century, it was held that mutual promises to marry were included in this category. [13] However, later judicial interpretations excluded such contracts.[14] Thus, section 4 applies to promises to pay money or settle property in consideration of marriage. This provision has been repealed in many of the same jurisdictions noted earlier in regard to promises by executors and administrators.[15] Similarly, it was repealed in Ontario by the Family Law Reform Act 1978.[16] Repeal has been recommended in Alberta.[17] Aside from the fact that such contracts lack practical significance, the issue of enforceability of relational agreements is best suited to family law legislation. Accordingly, it is recommended that this provision of Section 4 be repealed.

C. Contracts not to be Performed Within a Year from Making

If any one provision of section 4 might ambush a party to an action, it lies in the requirement that contracts not to be performed within a year be evidenced in writing. Because the section does not delineate the contracts affected, its potential is boundless. For this reason, courts have been reluctant to declare a contract to be within the scope of this particular provision of section 4. The law reports reveal the drawing of fine distinctions as to performance within a year. So, if a contract is for an indefinite period of time, but might be performed within a year, the Statute is deemed inapplicable.[18] Or, if a contract requires performance over a period in excess of

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Statute of Frauds and Cognate Enactment of South Australia (1975) (hereafter referred to as "South Australia Report").

10 Alberta Institute of Law Research and Reform, Report No. 44, *The Statute of Frauds and Related Legislation* (1985) (hereinafter referred to as "Alberta Report").

11 Ontario Law Reform Commission, *Report on Amendment Of The Law Of Contract* (1987), at p. 102, (hereinafter referred to as "Ontario Report".)

12 See *The Wills Act* R.S.N. 1970, c. 401 and compare with section 35 of the Wills Act, R.S.N.B. 1973, c. W-9, which reads as follows: "Where a person dies after the commencement of this Act, having by will appointed a personal executor, the executor is a trustee of any residue not expressly disposed of, for the person or persons, if any, who would be entitled to that residue in the event of intestacy in respect to it, unless the person so appointed executor was intended by the will to the residue beneficially."

13 *Philpott* v. *Wallet* (1682), 3 Lev. 66.

14 *Harrison* v. *Cage* (1698), Carth. 467 and *Cork* v. *Baker* (1717), 1 Strange 34, cited in Alberta Background Paper, *supra*, note 1, at p. 130.

15 See Manitoba Law Reform Commission Report No. 41, *Report on the Statute of Frauds* (1980) at p. 34 (hereafter the "Manitoba Report").

16 S.O. 1978, c. 2, replaced by Family Law Act, S.O. 1986, c. 4.

17 Alberta Background Paper, *supra*, note 1 at p. 130.

18 *McGregor* v. *McGregor* (1888), 21 Q.B.D. 424; *Adams* v. *Union Cinemas Ltd.*, [1939] 3 All E.R.

a year, but the parties have the power to terminate earlier, the Statute does not apply.[19]

Courts have drawn such fine distinctions in cases where the Statute is invoked as a procedural defence to avoid determination of substantive issues. For example, during recessionary periods there is a noticeable increase in litigation in the area of wrongful dismissal. If the Statute applies to the employment contract under consideration then, of course, there is no need for the employer to be concerned with the need to settle, or to offer or to substantiate the reasons for the employee's dismissal. Employees, however, can take comfort from the decision of the Supreme Court of Canada which expresses judicial antagonism to this provision. In *Cemco Electrical Manufacturing Company* v. *Van Snellenberg*,[20] it was held that an employment contract does not fall within the meaning of section 4 if all the obligations of the employee under the contract could have been carried out within a year from its commencement date. Thus, when the contract has no fixed term of employment the Statute would appear to be inapplicable, as the entire contract could have been performed within a year. However, in *Cemco*, the employee was required not to divulge trade secrets, not only during his employment, but also after its termination. Since all terms of the employment contract could not have been performed within a year, it would seem that the Statute should have provided a complete defence. Nevertheless, it was determined that since the employee might have died within the year the covenant was one which might have been performed within the year and thus the contract did not fall within the Statute.[21] While such judicial sophistry may achieve justice as between parties, it emphasizes the need to evaluate critically the efficacy of a writing requirement which is unlimited in its application. This explains its abrogation in England,[22] New Zealand[23] and British Columbia.[24] Its repeal has been recommended in Queensland,[25] South Australia,[26] Alberta[27] and Ontario.[28] It is recommended that this provision of section 4 be repealed.

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136 (C.A.).

19 *Hanau* v. *Ehrlich*, [1911] 2 K.B. 1056, [1912] A.C. 39. For a more detailed analysis, see Alberta Background Paper, *supra*, note 1, at p. 123.

20 [1947] S.C.R. 121.

21 See Kerwin J., at p. 125.

22 Law Reform (Enforcement of Contracts) Act, 1954, *supra*, note 3, s. 1.

23 Contracts Enforcement Act 1956, *supra*, note 4, s. 2.

24 Statute of Frauds, 1958, *supra*, note 6, s. 7.

25 Queensland Report, *supra*, note 8, at 7.

26 South Australia Report, *supra*, note 9, at 8.

27 Alberta Report, *supra*, note 10, at 53.

28 Ontario Report, *supra*, note 11, at pp. 102-23.

D. Contracts to Answer for the Debt, Default or Miscarriage of Another (Guarantees)

Although the Statute is not specific, it has long been recognized that this category encompasses contracts of guarantee. However, the precise meaning of the section is not clear and has required judicial redefinition. The Ontario Report offers a concise summary of the jurisprudence: "Debt refers to a contractual liability already incurred, whereas default refers to a future liability. Miscarriage has been interpreted as applying to a liability in tort."[29] Equally important, however, is the fact that this category of contracts does not include a promise of indemnity.[30] The distinction between guarantees and indemnities is fine indeed, but is critical with respect to the writing requirement.

A guarantee is regarded as a collateral obligation accepted by one party with regard to the possible default of another party to a primary indebtedness. Dissimilarly, an indemnity speaks of a promise whereby a person agrees to accept original liability for another's obligation. That is, liability is not premised on the default of another. While the distinction between the two promises can be explained readily, it can be difficult in practice to distinguish between the two types of obligations.

In addition to the exclusion of contracts of indemnity, there are two types of guarantees outside the ambit of section 4. Both exceptions are judicial inventions. The first covers cases in which the guarantor's promise is related to property in which he or she has a legal interest, which is best explained by illustration. A wishes to buy goods from B. C holds a possessory lien on the goods and hence A provides a guarantee to C for payment of the amount B owes to C. In consideration of the guarantee, C releases the goods to A.[31] The exception is justified on the basis that A receives a benefit in return for the guarantee and that the Statute's remedial purpose is with respect to persons who provide guarantees but do not receive any benefit. Nevertheless, the exception does not apply to personal guarantees of corporate debts.[32] Since the benefit received is of a personal, as opposed to proprietary, nature the writing requirement is not displaced. The second exception arises in the case of a *del credere* agent.[33] Such agents receive a commission for recruiting customers for their principal. They guarantee both performance by purchasers and their solvency. The rationale for the exception rests on the direct pecuniary benefit accruing to the agent.

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29 *Ibid.*, at p. 79 citing *Castling* v. *Aubert* (1802), 2 East 325, at 330-31, 102 E.R. 393, at 395; *Re Young and Harston's Contract* (1885), 31 Ch. D. 168 (C.A.) and *Kirkam* v. *Marter* (1819), 2 B & Ald. 613, 106 E.R. 490 respectively.

30 *E.g.*, *Yeoman Credit* v. *Latter*, [1961] 1 W.L.R. 828, [1961] 2 All E.R. 294 (C.A.).

31 See *Fitzgerald* v. *Dressler* (1859), 7 C.B.N.S. 374.

32 *Harburg India Rubber Comb Co.* v. *Martin*, [1902] 1 K.B. 778 (C.A.) and *Annarva Sales Ltd.* v. *Linke*, [1975] W.W.D. 32 (B.C.S.C.).

33 *Couturier* v. *Hastie* (1852), 8 Exch. 40, rev'd. on other grounds [1843-60] All E.R. Rep. 280.

It would be overly simplistic to recommend abrogation of the writing requirement in regard to contracts of guarantee. Law reform agencies are divided on the proper fate of that formality. While some have recommended repeal, others have retained the writing requirement and extended it to cover contracts of indemnity. In the circumstances, this category will be examined in greater detail below.[34] Land contracts are even more problematic.

E. Land Contracts

The manner in which section 4 describes land contracts lacks the syntactical sophistication necessary to identify readily the parameters of this contractual category. It reads: "any contract [for] sale of lands, tenement or hereditaments, or any interest in or concerning them...".[35] The immediate task is to determine what constitutes an interest in land or, more precisely, a contract concerning an interest in land. The Ontario Report offered a cryptic, but incisive answer: "It would appear to depend, to a large extent, on judicial perception of the benevolent or obstructive role played by the writing requirement in section 4."[36] Di Castri on *The Law of Vendor and Purchaser*[37] has compiled what appears to be an exhaustive list of contracts which may or may not come within the ambit of the Statute. (The "do not's" outnumber the "do's" by nearly two to one.) Pragmatically, the chances of successfully invoking the Statute as a procedural defence are slim. Courts have recognized that defendants are grasping at whatever technical excuses are available to evade otherwise enforceable obligations. At the same time, there is some certainty with respect to those contracts within the ambit of section 4. A Working Paper of the British Columbia Law Reform Commission outlines those instances where the application of the Statute is both obvious and problematic:[38]

> To be sure, a disposition of the fee simple, an agreement to convey an equity of redemption, and an agreement to grant a lease, come within the judicial definition of interests in land. The same may be said of agreements creating easements and 'profits a pendre' in land. On the other hand, mere licenses have been enforced on the basis of parol agreements since a license, not being an interest in land, falls outside the Statute of Frauds.
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> Difficulties have arisen, however, when the courts have been asked to consider agreements which, in the nature of things, are more ambiguous. For example, because an agreement must, in the words of the English Law of Property Act, be 'for the sale or other disposition of an interest

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34 See text *infra*, note 158.

35 The Statute actually reads "any contracts or sale of lands". If read literally, the provision would apply equally to conveyances of freehold and leasehold lands. Such a result is untenable. Sections 1 and 3 of the Statute deal with conveyances of land. Thus, "or" has been read as "for" and without generating any controversy. See A.L. Corbin on Contracts (1950), vol. 2, at p. 355.

36 Ontario Report, *supra*, note 11, at p. 80.

37 Toronto: Carswell (1988), Vol. 1, para. 132-134.

38 Produced in Alberta Background Paper, *supra*, note 1, at p. 25.

in land', agreements for other purposes, notwithstanding a peripheral involvement of an interest in land, have been held to fall outside the statute. Thus contracts to form a partnership, or to receive shares in a company, each of which involved land, have been excluded.

There are other contractual settings where the application of the Statute is less than obvious. Usually, Law Reform Commissions have concentrated on the applicability of the Statute to contracts dealing with produce of the soil or the sale of minerals and hydrocarbons. Therefore, each of these is examined below to illustrate the uncertainty surrounding the meaning of the term land and the corresponding applicability of the Statute in a given context.

At the outset, a distinction must be drawn between natural produce, *fructus naturales* (e.g. timber and grass) and annually sown crops, *fructus industriales*. The latter have always been considered goods, that is not part of the land, while the status of *fructus naturales* is dependent upon the time of severance. If under the contract they are severed immediately from the land, they are classified as goods. But if:[39]

> ... they are to derive a further benefit from the land through their continued attachment, then they are treated as land. The illogical result of these distinctions is that a contract relating to a field of wheat will concern goods while a contract relating to hay or grass will concern land, unless, of course, the contract relating to hay contemplates its immediate severance.

The question is complicated by the definition of goods in *The Sale of Goods Act*[40] It embraces "things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. "Since most contracts concerning agricultural products anticipate severance of the product, the sale of *fructus naturales* can become a sale of goods under *The Sale of Goods Act* but still be classified as land under the *Statute of Frauds*.[41] This can lead to anomalous results since the evidentiary requirements of the two statutes differ. Under *The Sale of Goods Act*[42] the contract is enforceable if there is acceptance and receipt of the goods or part payment or a signed note or memorandum in writing. The evidentiary provisions of *The Sale of Goods Act* could thus be met (e.g. via acceptance and receipt) while those of the *Statute of Frauds* would not. Apparently, the agreement would still be unenforceable since an agreement coming within both statutes must comply with both.[43]

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39 Manitoba Report, *supra*, note 15, at p. 37.
40 R.S.N. 1970, c. 341, s. 2.
41 M.P. Furmston, *Cheshire and Fifoot's Law of Contract*, (London: Butterworths, 9th ed., 1976), at p. 185.
42 *Supra*, note 40, s. 6(1).
43 See Alberta Background Paper, *supra*, note 1, at p. 27.

In determining whether a particular contract involves land or goods, a second area of dispute pertains to commodities, or things which form part of the land itself (e.g. minerals, oil, gas). Some agreements have been construed as contracts for the sale of goods.[44] The sale of minerals (already extracted from the land) or an agreement to sell minerals which the new land owner will mine have also been argued to be contracts for the sale of goods both at common law and under *The Sale of Goods Act*.[45] A royalty agreement pertaining to oil extracted from the land has been held not to be a contract concerning an interest in land and thus not covered by the *Statute of Frauds*.[46] Unfortunately, not all courts have agreed:[47]

> Other cases, however, suggest that such agreements come within the Statute of Frauds, either as contracts in respect of an interest in land, or as contracts in respect of the land itself. The reasons underlying the inconsistencies evident in this area are obscure. It may be that, where agreements were construed as concerning interests in land, the court in fact concentrated not on the physical nature of the oil, minerals, or gas referred to in the contract, but on the "package of rights" transferred thereunder.

Proper contract characterization, however, is an issue which pales in comparison to the writing requirement and the exception provided by the doctrine of part performance.

3. Evidentiary Requirements Under Section 4: Sufficient Memorandum or Note

Section 4 provides that no action shall be brought upon any contract for the sale of lands unless the agreement, or some memorandum or note thereof, is in writing and signed by the party to be charged (defendant) or some other authorized person (agent). The evidentiary requirement of the Statute can be satisfied if either the agreement itself is in writing or there exists some note or memorandum pertaining to the agreement. No particular form is specified with respect to the agreement or the memorandum. Moreover, the writing need not have been intended as a contractual document or as evidence thereof.[48] Hence, words contained in letters,[49] wills[50] or even a writing repudiating the agreement[51] will suffice. However, a memorandum that

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44 *Anglo-Iranian Oil Co. Ltd.* v. *Jaffrate*, [1953] 1 W.L.R. 246 (Alta.S.C.).
45 See Law Reform Commission of British Columbia Report No. 33, *Report on the Statute of Frauds* (1977) at p. 11 (hereafter referred to as "British Columbia Report").
46 *Emerald Resources Ltd.* v. *Sterling Oil Properties Management Ltd.* (1969), 3 D.L.R. (3d) 630 (Alta. S.C. A.D.), aff'd. (1971) 15 D.L.R. (3d) 256 (S.C.C.).
47 British Columbia Report, *supra*, note 45, at p. 11.
48 See generally M.G. Bridge, *The Statute of Frauds and Sale of Land Contracts* (1986), 64 Can. Bar. Rev. 58 at p. 73 *et seq.*, British Columbia Report, *supra* note 45, at p. 42 et seq.; Ontario Report, *supra*, note 11, at pp. 85-86; and Alberta Background Paper, *supra*, note 1, at p. 18 et seq.
49 *Maybury* v. *O'Brian* (1911), 25 O.L.R. 229 (Ont.H.C.).
50 *Re Hoyle*, [1893] 1 Ch. 84 (C.A.).
51 *Thirkell* v. *Cambi*, [1919] 2 K.B. 590 (C.A.).

either expressly or by implication denies the existence of the agreement, or a writing expressed to be "subject to contract", will not suffice.[52] The Statute is also satisfied by a note or memorandum that comes into existence after the formation of the contract, provided that the writing exists prior to the commencement of the action.[53]

As section 4 is silent as to what constitutes a sufficient writing, the content criterion of the writing requirement has been the subject of extensive litigation. Originally, all the terms of the agreement were required to be included but this has been relaxed so that in Canada today the writing need only contain what are referred to as "material" or "essential terms" of the agreement.[54] With respect to contracts for the sale of land, a description of the parties, the property and the price are deemed material.[55] The "three P's" may be looked on as a minimum content requirement. Together they constitute at law what is termed an "open contract for the sale of land". The real issue is whether the agreement or note must include all other agreed terms. Case law establishes that where the parties have agreed on a specific date for possession or the fixed duration of a lease, such terms are material or essential and thus must be included in the written memorandum.[56] On the other hand, courts will imply material terms which were not the subject of negotiation.[57] Where contracts fail to state the time of completion, a reasonable time has been implied. With respect to the precise legal interest being sold (e.g., fee simple), courts are prepared to make a determination based on the agreed price. As well, it is permissible for a party seeking enforcement to waive the benefit of an oral term of the contract in order to circumvent the Statute.[58]

Exceptions to the requirement that material terms of a contract for the sale of land be included in a written contract or memorandum considerably reduce the chances of a party successfully invoking the Statute. On the other hand, one Law Reform Commission concluded that the litigation establishing such exceptions "has left the precise meaning of 'note or memorandum in writing' virtually impossible to determine".[59] And of course, the exceptions undermine what has been criticized as a stringent writing requirement (i.e. that all material terms of the contract be in writing), and one that enables a

52 *Strickland* v. *Ross* (1912), 5 D.L.R. 706, 2 W.W.R. 887 (Sask. S.C.); *Tiverton Estates Ltd.* v. *Wearwell Ltd.*, [1974] 1 All E.R. 209 (C.A.); but see *Adam* v. *General Paper Co.* (1978), 85 D.L.R. (2d) 736 (Ont.H.C.).

53 *Farr, Smith and Co., Ltd.* v. *Messers Ltd.*, [1928] 1 K.B. 397.

54 *McKenzie et al.* v. *Hiscock et al.*, (1965), 54 W.W.R. 163 (Sask. C.A.); *Saperstein* v. *Drury*, [1943] 4 D.L.R. 191 (B.C.C.A.).

55 *McKenzie* v. *Walsh* (1920), 61 S.C.R. 312 and *Harvie* v. *Gibbons* (1980), 109 D.L.R. (3d) 559 (Alta. C.A.). But see as regards *price*, *Millar* v. *Whelan* (1861), 4 Nfld.L.R. 561.

56 See *Edwards* v. *Jones* (1921) 124, L.T. 740, *McKenzie* v. *Walsh*, *ibid.*; *Huttges* v. *Verner* (1975), 10 N.B.R. (2d) 533, aff'd. 12 N.B.R. (2d) 473 (C.A.); *Tweddell* v. *Henderson*, [1975] 1 W.L.R. 1496 (Ch.).

57 *McKenzie* v. *Walsh*, *ibid.*, and *Huttges* v. *Verner ibid.*

58 See Bridge, *supra*; note 48, at p. 80, n. 91.

59 British Columbia Report, *supra*, note 45, at p. 44.

defendant to escape liability under an existing agreement by proving that the contract included an essential term not incorporated in the written document.[60]

Liberalization of the writing requirement is not restricted to the contents of the memorandum or note. Parol evidence is admissible to resolve ambiguities where a memorandum is vague or incomplete. For example, such evidence is admissible to identity the parties or the extent of the interest in land, but not to vary or supplement the agreement.[61] Admittedly, the line between clarifying and supplementing a memorandum is not always obvious. In any event, some courts readily allow joinder of two or more documents to facilitate proof of the parties, property, price and other material terms of a section 4 contract.[62] With respect to joinder, there are three opinions on when joinder of documents is permissible:[63]

> Joinder requires there to be sufficient connection between the documents and appears to be allowed where the signed document refers to the existence of some other writing, which may then be identified by parol evidence. A minority view holds that joinder is allowed, even without a reference in the signed document to another writing, where the connection between the two appears once they are laid down side by side. The difference between these two views is seldom important and is bridged by the intermediate approach of requiring an implicit reference in the signed document to some other writing.

Parol evidence is impermissible if its function is to join two documents which are otherwise unconnected.[64] In each of the above situations, each writing must be signed or the signature must authenticate all documents comprising the required memorandum. This can occur, for example, by an earlier signed part contemplating or authorizing the execution of a later writing or by a subsequent signed document authenticating an earlier unsigned document.[65]

With respect to the requirement that the writing must be signed, once again the courts have adopted a flexible approach. The Ontario Report offers a succinct analysis:[66]

> [e]lasticity marks the courts' construction of the statutory requirement that the writing must be signed by the person being sued or by his or her agent. The party's signature need not appear at the end of the writing being relied upon; it may appear in any part of the writing and initials will suffice. Nor is the "signature" required to be handwritten, it being

60 Bridge, *supra*, note 48, at p. 80.
61 *Ibid.*, at p. 79.
62 Ontario Report, *supra*, note 11, at p. 86; see *Millar* v. *Whelan* (1861), 4 Nfld.L.R. 561.
63 See Bridge, *supra*, note 48, at p. 81.
64 See British Columbia Report, *supra*, note 45, at p. 43 citing *Long* v. *Millar* (1879) 4 C.P.D. 450 (C.A.) and *Timmins* v. *Moreland Street Property Co.*, [1958] Ch. 110.
65 See Bridge, *supra*, note 48, at p. 81 and in particular cases cited in notes 98-101 inclusive.
66 Ontario Report, *supra*, note 11, at p. 86.

settled that a writing by the party to be charged on his printed letter head may satisfy the statutory requirement.

4. The Effect of Non-compliance

Section 4 provides that no action shall be brought unless the contract is sufficiently evidenced in writing. Initially, it was held that oral contracts were void.[67] Later judgments held that such contracts were merely unenforceable.[68] Of course, the distinction between contracts which are void and merely voidable is significant in a number of respects. A plaintiff may obtain specific performance of an oral contract if the defendant fails to plead that there is no writing sufficient to satisfy the Statute.[69] But once the Statute is pleaded, the onus is on the plaintiff to prove compliance with the writing requirement. Obviously control of the pleadings lies with counsel for the defendant. Another facet of unenforceability stems from the ability of a party, the defendant, to raise an oral agreement as a defence to an action. A practical example arises in situations where a purchaser brings an action to recover a deposit which has been forfeited because of the purchaser's repudiation of the oral contract. There the vendor may raise the breach of the oral contract as a defence to the purchaser's action.[70] Moreover, an oral agreement, though unenforceable, may support an action brought on a cheque given as a deposit in regard to a real estate transaction.[71] Since the plaintiff is suing on the negotiable instrument and not on the oral contract, section 4 is deemed inapplicable. Undoubtedly, the courts have reached for every device to mitigate the rigours of a Statute which, to many, has outlived its usefulness as an instrument for achieving justice. The debilitating effect of the Statute has also been diminished through the doctrines of part performance and unjust enrichment.

5. Relief From The Effects Of Non-compliance: Part Performance And Restitution

Though a party wishing to sue on a contract may be unable to satisfy the Statute's writing requirement, relief from the effects of non-compliance remains as a possibility. The doctrine of part performance, where applicable, takes the oral contract outside the ambit of the Statute, and into the realm of specific performance. The doctrine is a creation of courts of equity and is generally regarded as applicable only in cases concerning land, although the law is not settled on this point.[72] Aside from that limitation, the Ontario Law Reform Commission praised the doctrine:[73]

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67 See *Carrington* v. *Roots* (1837), 2 M & W 248.
68 See *Maddison* v. *Alderson* (1883) 8 App. Cas. 467 (H.L.), at p. 488.
69 *Keefer* v. *Roaf* (1885), 8 O.R. 69; *Dom. Metal Co.* v. *Jamieson*, [1917] 3 W.W.R. 929 (Alta. C.A.).
70 *Thomas* v. *Brown* (1876), 1 Q.B.D. 714; *Switzers Investment Ltd. Bus* (1964), 49 W.W.R. 627 (Alta. S.C.).
71 *Low* v. *Fry* (1935), 152 L.T. 585.

> The doctrine of past performance constitutes one of the most remarkable chapters in the history of the Statute of Frauds and represents a striking example of equity's willingness to ignore the seemingly clear language of a statute in order to prevent injustice.

Notably within ten years courts of equity developed the doctrine to meet the shortcomings of the 1677 Statute.[74] At the same time, the doctrine itself is subject to limitations and is not a universal panacea. When reduced to its elements, the outstanding issue can be simply stated: what acts of part performance are sufficient to take a land contract outside the Statute? The difficulty in providing a simple answer stems from the fact that there are two tests which have been applied by the courts. The debate has focused on the restricted (unequivocally referable)test and the liberal test. The issue is complicated by the fact that even if the restricted test is adopted by a court, its application in a particular fact situation suggests that courts are only paying lip service to it. In other words, a court may articulate the restricted test but apply the liberal criterion to the particular facts. Consequently, there is considerable uncertainty surrounding the doctrine and, in particular, the sufficiency of the acts of part performance.

An analysis of four English cases will illustrate the scope and limitations of the doctrine. Three must be considered 'leading cases'. Together they reflect the history and present state of English law. The fourth offers a classical paradigm of the restricted test. Following their analysis, discussion will focus on the three Supreme Court of Canada decisions which serve as binding precedents in regard to the doctrine of part performance. The approaches of provincial trial and appellate courts, outside Newfoundland, to the law of our Court of last resort raises matters beyond the scope of the discussion paper. Suffice it to say that the extent to which any decision of our Supreme Court generates ambiguity, that ambiguity will be reflected in the adoption of disparate approaches to the resolution of legal problems.

A. The English Position

In *Maddison* v. *Alderson*,[75] a man induced a woman to serve him for many years as his housekeeper without remuneration. He promised verbally to draft a will leaving her a life estate in his property. Twelve years later, a will was drawn and signed by him in which the housekeeper benefited as per the verbal promise. Unfortunately, the will failed for want of due attestation. The only evidence to corroborate the plaintiff housekeeper's allegation of the oral promise was the unattested will, which made no reference to the

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72 See Ontario Report, *supra* note 11, at p. 87 citing *Britain* v. *Rossiter* (1879), 11 Q.B.D. 123 (C.A.) and *McManus* v. *Cooke* (1887), 35 Ch. D. 681.

73 *Ibid.*, at p. 89. See also British Columbia Report *supra*, note 45, at pp. 15-25; Alberta Background Paper, *supra*, note 1, at 31-40; Alberta Report *supra*, note 10, at pp. 4-17.

74 *Butcher* v. *Stapley* (1685), 1 Vern. 363, 23 E.R. 524.

75 (1883), 8 Appl. Cas. 467.

reasons for the bequest. Nonetheless, the jury, the trial judge and the Court of Appeal were satisfied that an oral contract had been reached. However, on further appeal, Lord O'Hogan was not convinced that the intestate made such a promise.[76] Moreover, two of their Lordships expressed difficulty in accepting that the plaintiff and the intestate had entered into an enforceable contract. That belief was not based on the failure to satisfy the writing requirement, nor lack of credibility on the part of the plaintiff, but because at law there was no binding contract oral or otherwise. Counsel for the defendant argued in effect that no contract came into existence until the death of the intestate and hence, the acts of part performance were not referrable to any contract concerning land. In other words, the plaintiff's services were a condition precedent to establishing a unilateral contract and hence must be distinguished from acts undertaken after a bilateral contract had been concluded and in performance of that contract. That argument found favour with Lords Selborne and O'Hogan.[77] Nonetheless, their Lordships proceeded to deal with the issue regarding the sufficiency of the acts of performance.

The trial judge had found that there was sufficient part performance to take the case out of the *Statute of Frauds*. The Court of Appeal thought otherwise. On further appeal, Lord Selborne rationalized the doctrine in the following terms.[78]

> In a suit founded on such part performance, the defendant is really "Charged" upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the Statute) upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow.

His Lordship then proceeded to state what is now regarded as the "restricted" test of sufficiency:[79]

> All the authorities show that the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged.

Lord Selborne concluded that the plaintiff's service to the intestate, without payment of wages, was not of itself evidence of a contract concerning her employer's land. Of course such acts by themselves are consistent with other contractual arrangements. As an evidentiary matter, parol evidence is restricted initially to the alleged acts of part performance. No further explanation of the acts is permissible. It is at this point that the court or jury is required to determine whether the acts are unequivocally referable to the type of land contract for which specific performance is being sought.

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76 *Ibid.*, at p. 486.
77 *Ibid.*, Lord Selborne at p. 472-80; and Lord O'Hogan at p. 484.
78 *Ibid.*, at p. 475.
79 *Ibid.*, at p. 479.

Applying the unequivocally referable test, it is not difficult to appreciate why the House of Lords concluded that payment of a sum of money, towards the purchase price, is not a sufficient act of part performance.[80] And the same may be said in regard to a person who performs services for an employer even though without compensation.

What then are sufficient acts of part performance? Bearing in mind that the acts must be done in execution (performance) of the contract, it is not simply a matter of finding detrimental reliance on the part of the plaintiff. Admittedly, acts done in execution of the contract will give rise to detrimental reliance, but the converse is not always true. A person relying on an oral contract may well suffer a detriment, not in performance of the contract, but rather on reliance that the defendant will honour his or her oral promise. In that sense, detrimental reliance does not give rise to one of those inequities on which the doctrine of part performance can be invoked. Against this backdrop, Lord Selborne offers, by example, a factual situation in which the doctrine may be successfully invoked:[81]

> Let the case be supposed of a parol contract to sell land, completely performed on both sides, as to everything except conveyance; the whole purchase-money paid; the purchaser put into possession; expenditure by him (say in costly buildings) upon the property; leases granted by him to tenants. The contract is not a nullity; there is nothing in the statute to estop any Court which may have to exercise jurisdiction in the matter from inquiring into and taking notice of the truth of the facts. All the acts done must be referred to the actual contract, which is a measure and test of their legal and equitable character and consequences. If, therefore, in such a case a conveyance were refused, and an action of ejectment brought by the vendor or his heir against the purchaser, nothing could be done towards ascertaining and adjusting the equitable rights and liabilities of the parties, without taking the contract into account. The matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded. The choice is between undoing what has been done (which is not always possible, or, if possible, just) and completing what has been left undone.

The unequivocally referable or restricted test in *Maddison* v. *Alderson* is not the only criterion to be met if the Statute is to be avoided. Just as the common law developed a multitude of substantive and procedural rules, so too did courts of equity. *Alderson* was decided in 1883. By 1925 the doctrine of part performance had developed to the point where several criteria had to be met by plaintiffs who could not meet the writing requirement. This is made abundantly clear in *Rawlinson* v. *Ames*.[82] In that case Romer J., citing Fry on Specific Performance, summarized the law as follows:[83]

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80 *Ibid.*
81 *Ibid.*, at pp. 475-6.
82 [1925] Ch. 96.

> In order thus to withdraw a contract from the operation of the statute, several circumstances must concur: 1st, the acts of part performance must be such as not only to be referable to a contract such as that alleged, but to be referable to no other title; 2ndly, they must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing; 3rdly, the contract to which they refer must be such as in its own nature is enforceable by the Court; and 4thly, there must be proper parol evidence of the contract which is let in by the acts of part performance.

To these four criteria must be added a fifth. The acts of part performance must be carried out by the plaintiff with the knowledge of the defendant. The application of these criteria to the facts in *Ames* is instructive. There the defendant had entered into an oral contract with the plaintiff to lease a flat. It was agreed that certain alterations would be made. During the period alterations were being effected, the defendant frequently visited the flat and made suggestions for further modifications. They were carried out by the plaintiff. Subsequently, the defendant repudiated the contract and the plaintiff brought an action for specific performance. By way of defence, the defendant pleaded the Statute.

The primary issue was whether the expenditure of money by the plaintiff on renovations to the flat were acts unequivocally referable to the alleged oral contract. The answer to that question was framed in the negative. Such acts are equally referable to the plaintiff's ownership of the premises. However, Romer J. concluded that the act of the plaintiff acceding to the repeated requests by the defendant in regard to renovations, was referable only to the alleged oral agreement. Hence, the plaintiff had met the restricted test. The remaining obstacle to invoking successfully the doctrine of part performance was the requirement that acts of the plaintiff be such as to render it a fraud in the defendant to take advantage of the agreement for lease not being in writing. Normally, a plaintiff would not be able to satisfy that criterion where the acts of part performance constitute improvements to his or her property. But in *Ames*, the alterations requested by the defendant left the plaintiff with a flat "which is not likely to commend itself to tenants".[84] Apparently the alterations were such that the plaintiff would have had to expend a considerable sum to alter the flat to make it suitable for other prospective tenants. Though this aspect of the judgment appears tenuous, it provided the legal basis on which to grant an order of specific performance.

Until 1963 the law as stated in *Maddison* went unchallenged. But in that year, the English Court of Appeal adopted what is now termed the liberal test. Interestingly enough, the Court of Appeal made no reference to the earlier decision of the House of Lords. In *Kingswood Estate Co. Ltd.* v.

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83 *Ibid.*, at p. 114.
84 *Supra*, note 82, at p. 115.

Anderson,[85] the tenant, an elderly widow, had resided for about 45 years in premises controlled by the *Rent Restrictions Act*. Her landlord's company wanted vacant possession of the premises for the purposes of development. The landlords purchased another house and offered the tenant a flat in which she and her invalid son could live in for the rest of their lives. The tenant and her son moved to the new accommodation and paid rent under a scheme which amounted to a weekly tenancy. Subsequently, the landlord gave notice to quit and sought an order for possession. The tenant argued that an oral agreement had been reached with respect to the duration of the tenancy in the substitute premises. With respect to the landlord's argument of non-compliance with the *Statute of Frauds*, the Court of Appeal rejected the unequivocally referable test, which the tenant could not meet, thereby lowering the threshold: "... the acts in question [must] be such as must be referred to some contract, and may be referred to the alleged one".[86]

While *Anderson* may be regarded as the case initiating the demise of the unequivocally referable test under English law, the 1971 decision of the House of Lords in *Steadman* v. *Steadman*[87] virtually laid it to rest. Today, sufficient acts of part performance are those which, on a balance of probabilities, point to some contract between the parties and are consistent with the oral agreement alleged. Moreover, their Lordships rejected a general rule that payment of money cannot constitute sufficient acts of part performance. The facts of *Steadman* illustrate both these developments.

The parties were negotiating a marriage settlement with respect to their marital home when the husband, who owed 199 pounds in maintenance arrears, applied to the court to have the maintenance order varied. Prior to the hearing of that application, the parties agreed that the wife would surrender her interest in the house for 1500 pounds. In return, it was agreed that the maintenance order for the wife should be discharged and that the arrears of maintenance would be reduced to 100 pounds and paid by a fixed date. The parties then proceeded to have the application with respect to the maintenance order heard. On the basis of the oral agreement, the court discharged the maintenance order save for the 100 pounds. The husband paid that amount but the wife refused to convey her interest in the marital home. Their Lordships held that payment of 100 pounds and the preparation of the conveyancing documents, were sufficient acts of part performance. Had their Lordships applied the test in *Maddison* the opposite result might have been warranted.

85 [1963] 2 Q.B. 169 (C.A.).
86 *Ibid.*, at p. 189.
87 [1976] A.C. 536 (H.L.).

B. The Canadian Position

The first of the three Supreme Court of Canada decisions to canvass the doctrine of part performance was *Deglman* v. *Guaranty Trust Co. and Constantineau.*[88] There the plaintiff alleged that in return for personal services rendered by him as requested from time to time by his aunt, she would devise her home to him. The plaintiff did odd jobs around the home and took his aunt on short automobile trips. On the death of the aunt, it was learned that she had not honoured her part of the bargain. Her estate resisted the claim for specific performance. The Supreme Court applied the strict test stated in *Maddison* and hence the oral agreement was deemed unenforceable. However, the Supreme Court did allow the plaintiff to recover for the services rendered on the basis of a *quantum meruit*. It is interesting to note that the court valued those services at $3,000, an amount substantially less than the value of the home. One might speculate that the Supreme Court was not convinced that the aunt had made the alleged oral contract, or if she had, that the consideration for her promise was grossly inadequate.

The second case is *Brownscombe* v. *Public Trustee of Alberta.*[89] There the Supreme Court remained steadfast in the application of the restricted test. The plaintiff had performed services for the intestate over a period of twenty-six years. The intestate owned a farm but, during his lifetime, was physically unable to carry on farming operations. On several occasions, the intestate had promised to leave the farm in his will to the plaintiff provided the latter continued to run the operation. The plaintiff did so but received very little in the way of financial reward. At the insistence of the intestate the plaintiff built a house, at his own expense, on the intestate's land.[90] The Supreme Court held that rendering of personal services by the plaintiff were not acts unequivocally referable to the alleged oral contract. However, the erection of a home on the lands in questions, was deemed sufficient to invoke the doctrine of part performance. As the Public Trustee had sold the property, the plaintiff was awarded $38,000 as damages in lieu of specific performance. That amount represented the sale price of the lands. It is noteworthy that the Supreme Court made specific reference to the fact that the plaintiff's evidence of the oral agreement was corroborated by the evidence of four independent witnesses.[91]

The third decision of the Supreme Court is *Thompson* v. *Guaranty Trust of Canada*,[92] which is similar to *Brownscombe*. In *Thompson*, the plaintiff

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88 [1954] S.C.R. 725.
89 [1969] S.C.R. 658.
90 Apparently the plaintiff did not erect a new home but rather carried out extensive renovations to the farm house at his own expense. This point is revealed in *Thompson* v. *Guaranty Trust Co.*, [1974] S.C.R. 1023 at p. 1035.
91 *Supra*, note 89, at p. 661.
92 [1974] S.C.R. 1023.

had worked as a farm hand for the intestate for a period of 46 years. Once again, there was an oral promise that if the plaintiff remained in the service of the intestate, the lands in question would be left to the plaintiff. The acts of part performance relied on related to the operation and management of the farm. As well, this bargain included a profit sharing arrangement. The Supreme Court held that there were sufficient acts of part performance to take the contract outside the ambit of the *Statute of Frauds*. Moreover, it held that those acts were unequivocally referable to the lands in question. That finding is difficult to accept and more so once the decision in *Maddison* v. *Alderson* is reexamined. The reality is that the Supreme Court applied the liberal test while enunciating the strict one. But in support of *Thompson*, it must be acknowledged that there was conclusive proof of the alleged oral contract. The intestate had asked an insurance agent/notary public to draft a will leaving the property to the plaintiff. A document was prepared and then executed by the intestate, but unfortunately that document was only a power of attorney.

It is difficult to reconcile the decisions of the Supreme Court in regard to the actual test being applied for determining the sufficiency of acts of part performance. Of course, ambiguity provides the basis on which trial and appellate courts in each province can reformulate the proper test without disregarding the principle of *stare decisis*. It does not explain, for example, how the British Columbia Court of Appeal[93] could apply the House of Lord's decision in *Steadman* v. *Steadman* without at least acknowledging the decisions of our Supreme Court.

In addition, there are other aspects of the doctrine which have yet to be resolved. One which is frequently discussed focuses on whether relief is available when specific performance is inapplicable, even though the plaintiff has undertaken sufficient acts of part performance. For example, the property may have been subsequently sold to a purchaser without notice of the prior claim. In those circumstances the issue is whether the court may award damages to the plaintiff in lieu of specific performance. In England, prior to the adoption of the *Chancery Procedure Amendment Act* (Lord Cairn's Act)[94] in 1858 the answer was framed in the negative. That was the prerogative of the common law courts, which would not award damages if the plaintiff failed to meet the writing requirement under the Statute.

Lord Cairn's Act did have the effect, however, of permitting a court of equity to award damages in lieu of specific performance. Section 2 of that Act provides:

> In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant,

93 See *Currie* v. *Thomas* (1985), 3 C.P.C. (2d) 42 (B.C.C.A.).
94 (1858), 21 & 22 Vict. (U.K.), c.27.

> contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the Court shall direct.

The equivalent provision in Newfoundland can be traced initially to section 89 of *The Judicature Act*,[95] which vests courts with the jurisdiction to grant such relief as existed under *The Newfoundland Judicature Act* of 1889.[96] While the point is not clear, it is arguable that section 13 of the latter Act enables a court to award damages in lieu of specific performance in the same manner as contemplated by section 2 of Lord Cairns's Act. Though at first glance it might appear that a plaintiff who is able to avoid the Statute by successfully invoking the doctrine of part performance can recover damages, if in the interim, the property has been sold, the English decision of 1888 in *Lavery* v. *Purcell*,[97] suggests otherwise. In that case, Chitty J. held that a court of equity could not award damages in a case where it could not award specific performance. In other words, damages can only be awarded in substitution if it is still possible to grant the order of specific performance.

Lavery has been followed in a number of Canadian cases.[98] On the other hand, there are as many in which damages have been awarded despite the fact that specific performance was no longer available.[99] The Supreme Court of Canada's decision in *Brownscombe* v. *Public Trustee of Alberta*[100] discussed earlier is apt. Though the damages issue does not appear to have been raised in argument, the fact that the Supreme Court awarded damages, even though specific performance was no longer available, cannot be ignored. Moreover, the Court's later decision in *Dobson* v. *Winton & Robbins Ltd.*[101] clarifies the jurisdiction to award damages in the circumstances outlined

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95 S.N. 1986, c. 42.

96 Consolidated Statutes of Newfoundland (second series) 1892. See *Arns and Arns* v. *Halliday and Halliday* (1982) 36 Nfld. & P.E.I.R. 337 (Nfld. T.D.) where it appears to have been assumed that the Court had jurisdiction to award damages in lieu of specific performance. However, the jurisdictional issue was not raised. This is unfortunate. *Lord Cairn's Act* has never been expressly enacted in Newfoundland nor was it received as part of Newfoundland law pursuant to the reception of English law doctrine because its date of passage (1858) was subsequent to the cut off date for reception, viz. July 26, 1832. *Lord Cairns Act* was repealed in England in 1883 by the *Statute Law Revision and Civil Procedure Act* 46 and 47 Vict. c. 49, but with the proviso in s. 5 that the repeal should not affect any jurisdiction or principle of law or equity established or confirmed by an enactment so repealed. *Leeds Industrial* v. *Slack* [1924] A.C. 851 at 861f. (H.L.). In Newfoundland, *The Judicature Act 1889*, section 13, does not, unfortunately, make express reference to either *Lord Cairn's Act* or *The Statute Law Revision and Civil Procedure Act*; nor does the express wording used in section 2 of the Act 21 and 22 Vict (U.K.), c. 27, appear. The assumption in *Arns*, however, would appear to be that the Court had the requisite jurisdiction.

97 (1888), 39 Ch. D. 508.

98 See for example *Pearson* v. *Skinner School Bus Lines (St. Thomas) Ltd.* [1968] 2 O.R. 329 (H.C.); *Carter* v. *Irving Oil Co. Ltd.*, [1952] 4 D.L.R. 128 (N.S.S.C.) and *Robinson* v. *MacAdam*, [1948] 2 W.W.R. 425 (B.C.S.C.).

99 See *McIntyre* v. *Stockdale* (1913), 27 O.L.R. 460 (H.C.) and *Pfeifer* v. *Pfeifer* [1950] 2 W.W.R. 1227 (Sask.C.A.).

100 *Supra*, note 89.

101 (1960) 20 D.L.R. (2d) 164 (S.C.C.).

above. In that case, the plaintiff sued for damages in lieu of specific performance for breach of a written (enforceable) contract, notwithstanding the fact that the property had been sold to a third party. Lord Cairn's Act was raised as a defence to the plaintiff's action for damages. It was rejected outright: "The problem now is not one of jurisdiction or substantive law, but the narrow one of pleading."[102] In light of these decisions, it should only be necessary that the plaintiff plead damages in lieu of specific performance.[103]

The jurisdictional conundrum is perhaps more imaginary than real if due regard is accorded to relevant decisions of the Supreme Court. Those who might wish to argue for a restrictive interpretation of Lord Cairn's Act may have difficulty offering a plausible policy rationale in support of their position. Assuming, however, that damages may be awarded in lieu of specific performance, there is yet another legal issue which must be acknowledged - the proper measure of damages.

In *Wroth* v. *Tyler*,[104] the plaintiff purchaser sued the defendant vendor for breach of a contract for the sale of lands. Though the land remained available, the court was unwilling for diverse reasons to grant specific performance and, hence, awarded damages. The common law rule is that damages are assessed as of the date of breach (usually the closing date) and measured by the difference between the fair market value at that date and the contract price. However, in *Wroth* the breach occurred in an inflationary period and by the date of trial a comparable home cost nearly twice the contract price. Megarry J. seized on the notion of equitable damages under Lord Cairn's Act to justify the calculation of damages as of the date of judgment rather than the date of contractual performance. The case did not deal with the question whether a similar award could be made at common law. Subsequently, in *Johnson* v. *Agnew*,[105] the House of Lords suggested that in calculating damages no distinction should be drawn between common law and equitable rules. Moreover, their Lordships concluded that there is no inflexible rule that common law damages must be assessed at the date of breach (performance). Canadian courts have, for the most part, continued to assess damages as of date of breach but, where appropriate, use the date of trial.[106] Inevitably the larger measure of damages is awarded in cases when land prices are rising rapidly.

The proper method for assessing damages may seem far removed from the law surrounding the *Statute of Frauds*, including the doctrine of part

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102 *Ibid.*, at p.166.
103 Typically the plaintiff will seek, specific performance, specific performance and damages or damages in lieu of specific performance.
104 [1974] Ch. 30.
105 [1979] 1 All E.R. 883 (H.L.).
106 E.g. *Metro Trust Co.* v. *Pressure Concrete Services Ltd.* (1975), 60 D.L.R. (3d) 431 (Ont. C.A.).

performance. Moreover, the damages issue is not resolved even if the legislature is willing to repeal the Statute. What is of interest is the fact that once it is accepted that damages may be awarded under Lord Cairn's Act, there is a slight but remote chance that the damage award could be greater than that available at common law. But it is neither sound in logic nor law that a plaintiff under an oral contract enforceable because of sufficient acts of part performance would be entitled to an award greater than that available to a plaintiff who meets the writing requirement under the Statute. The true issue is the proper date for assessing fair market value - the date of breach or some other date such as trial or judgment.

6. Newfoundland Case Law

There are at least thirty cases in which Newfoundland courts have been called on to resolve disputes in which the Statute has been raised in argument.[107] Interestingly enough, they were decided within one of two time periods. Twenty cases, were decided between 1976 and 1990. The remaining ten cases were decided between 1849 and 1893. Of the modern cases, twelve of the twenty involve land contracts. Two cases held that the contracts in question did not fall within section 4 of the Statute. Six cases dealt with the sufficiency of the memo while four turned on the doctrine of part performance. Six cases involve guarantees or indemnities. Of the two remaining cases, one involves section 1 of the Statute. That section imposes a writing requirement in regard to conveyances of land. The remaining case makes only a passing reference to the *Statute of Frauds Amendment Act* of 1828. The decisions of the 19th century fall into one of three categories. One case deals with contracts of guarantee. Four cases involve the sale of goods. Five cases examine the Statute in the context of the sale of land. With respect to the latter group, the issues raised relate to the lack of a memo, the sufficiency of such, whether the person who signed was an authorized agent and, finally, the application of the doctrine of part performance.

A. Guarantees

(i) The Case Analysis

There is no common thread linking the cases dealing with contracts of guarantees. Accordingly, a descriptive analysis of the facts and issues of each case is necessary to appreciate the context in which the Statute has been invoked.

(l) *Taran Furs (Mtl.) Inc.* v. *Canadian Imperial Bank of Commerce* (1984), 49 Nfld. & P.E.I.R. 128 (Nfld. S.C.T.D.).

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107 The vast majority of these decisions are reported. However, a few remain unreported but available on *Quicklaw*.

The plaintiff had agreed to ship furs to a third party on the basis that it would either receive money or the furs would be returned. The plaintiff received a cheque from the third party which was dishonoured by the defendant bank. After the third party made an assignment in bankruptcy, the plaintiff brought an action against the defendant bank. One of the arguments advanced by the plaintiff was that the defendant bank allegedly undertook to honour cheques written by the third party in favour of the plaintiff. Though not raised by the defendant, the court discussed the possibility that the alleged undertaking constituted a guarantee which would have failed for lack of the required memorandum. More important was the finding by Mr. Justice Goodridge that it was inconceivable that the plaintiff, an experienced businessman, could believe that anything said to him by an employee of the defendant bank would constitute a guarantee.

(2) *CLS Investments* v. *Best* (1978), 19 Nfld. & P.E.I.R. 212 (Nfld. S.C.T.D.)

The plaintiff mortgagee brought an action against guarantors of the mortgagor. Default judgment had been taken against two of the co-guarantors. In an action against the third guarantor, the Court held that the signature of a guarantor need not be witnessed.

(3) *Irving Oil Limited* v. *Luby* (1982), 39 Nfld. & P.E.I.R. 295 (Nfld. Dist. Ct.)

The plaintiff brought an action against the defendant on his guarantee for payment of oil supplied to the defendant's company. One of the defences raised was that the guarantee was unenforceable for failing to state on the face of it the consideration provided for the guarantee. The Court simply referred to section 11 of the *Limitation of Actions (Personal) and Guarantees Act*, (R.S.N. 1970, c.206) which renders it unnecessary to state on the writing the consideration for a guarantee.

(4) *Trident Construction Limited* v. *Capital Crane Limited and Foundation Lundrigan* (1987), 64 Nfld. & P.E.I.R. 300 (Nfld. S.C.T.D.).

The plaintiff leased a crane to the first defendant who assumed responsibility for all damages, except in regard to repairs necessitated as a result of normal wear and tear. With the approval of the plaintiff, the first defendant leased the crane to the second defendant. The crane was subsequently damaged beyond repair. The first defendant sought indemnity from the second defendant. The court allowed the claim on the basis of an oral contract of indemnity between the two defendants for all loss or damage other than that arising from ordinary wear and tear. The Court held that as contracts of indemnity fall outside the ambit of section 4, the Statute could not be raised as a defence.

(5) *Joy* v. *Bank of Montreal* (1977), 19 Nfld. & P.E.I.R. 28 (Nfld. S.C.T.D.).

The two plaintiffs were shareholders and officers of a company that was experiencing financial difficulty. There was an oral agreement between the plaintiffs and the defendant bank that the former would refinance by mortgage and deposit the proceeds with the defendant in the company's account to be used as working capital. Though the defendant had approved the mortgage financing and allowed the plaintiffs to continue to operate on an overdraft, the plaintiffs obtained the mortgage monies from another source and then purchased a term deposit rather than depositing the monies into the company's account. At the bank's insistence, the plaintiffs signed a document authorizing the bank to transfer the term deposit to the company's account. Subsequently, the two plaintiffs brought an action against the bank for the amount transferred. The court held that section 4 of the Statute was inapplicable as the oral agreement between the parties was a contract of indemnity. The agreement in this case was an undertaking to deposit monies independently of any default by another party (the company). Furthermore, the Court held that even if the agreement constituted a guarantee, the oral contract was valid and could be set up as a defence by the bank. The court held that the Statute could not be invoked to recover monies previously transferred to the bank.

(6) *Blue Chip Investments Inc.* v. *Kavanagh* (1986), 60 Nfld. & P.E.I.R. 85 (Nfld. S.C.T.D.)

S company leased premises from E company with the defendants acting as guarantors for S company. E Company allegedly assigned their rights as lessors to the plaintiff. S Company went into bankruptcy and the plaintiffs sued the guarantors. The Court noted that while the Statute requires that a guarantee be in writing, there is no such statutory requirement in the case of an assignment of a guarantee. However, the action was dismissed because the plaintiff did not prove it was the successor of the original lessor.

(7) *Willey* v. *Paul* (1861), 4 Nfld. L.R. 627

B was indebted to the plaintiff who seized B's boat for nonpayment. At the request of the defendant, the plaintiff released the boat to B. In return, the defendant signed a memorandum agreeing to repay the debt in annual instalments. The defendant made only one payment and the plaintiff then sued for the balance. The memo made no mention of the plaintiff releasing B's boat. The court held that this contract did not come with the Statute and, therefore, it was unnecessary that the memo disclose a sufficient consideration to sustain the contract.

Note: The memo was neither a guarantee nor indemnity but rather an independent contract supported by fresh consideration. As well, it is no longer necessary that the memo state the consideration for a guarantee; see *Limitation of Actions (Personal) and Guarantees Act*, R.S.N. 1970, c.206, s.11.

ii) Summary

Perhaps the true benefit of the foregoing descriptive analysis arises when consideration is given to the following question. If the writing requirement in regard to contracts of guarantee had been repealed earlier, would that reform measure have had a negative effect on the result achieved in each of the foregoing cases? On reflection, there is support for the generalization that each case would be decided no differently. The truth of the matter is that the Statute serves as a technical defence unsupported by any substantive policy consideration and hence more apt to render unenforceable fair and reasonable bargains. This tentative conclusion should be borne in mind when consideration is given to determining the proper fate of the writing requirement in regard to contractual guarantees.

B. Contracts For The Sale Of Land

While a doctrinal analysis of Newfoundland law in regard to section 4 of the Statute of Frauds might be useful for comparative purposes, the paucity of known cases precludes that type of analysis. In determining the proper fate of section 4, it is at the very least beneficial to appreciate the factual contexts in which the Statute has been pleaded as a defence. A recommendation to abolish the writing requirement will only be accepted if the benefits to be derived from that reform measure outweigh any perceived drawbacks. A review of existing case law forces us to focus on the effect of statutory law in practice as opposed to theory.

(i) Types of Contracts Outside Section 4

(1) *Gosse* v. *Gosse* (1984), 50 Nfld. & P.E.I.R. 27 (Nfld. C.A.)

The defendant developer sold a lot to the plaintiff. The defendant agreed orally to construct a road on his lands to permit access to the plaintiff's lot. Subsequently the plaintiff obtained alternate access from a third party and agreed to accept that access in lieu of the proposed road. The road was not completed, but the purchasers brought an action for specific performance or damages in substitution. One of the defences raised by the defendant was that the agreement was not in writing. The Court of Appeal held that an agreement to construct a road on the defendant's land was not a contract within section 4 of the Statute and hence the oral agreement was enforceable as was the subsequent oral modification to accept the alternate access in lieu of the proposed road.

(2) *Simmons* v. *Simmons*, (1988) 70 Nfld. & P.E.I.R. 222 (Nfld. U.F.C.)

A husband and wife were experiencing financial difficulty. The father of the husband provided the son with $20,000 in order to reduce the amount owing on a mortgage of the marital home. The couple separated and the house was sold. The proceeds were divided equally except with respect to the $20,000. At issue was whether the money was intended as a gift or a loan. The father and son then commenced an action against the latter's wife for

the return of the money on the basis that it was a loan and not a gift. The son's wife raised section 4 of the Statute arguing that the contract was not in writing. The Court responded: "this is not a case to which the Statute of Frauds applies".

(ii) Sufficiency of Memorandum Or Note

(1) *Garland* v. *Jerrett* (1989), 77 Nfld. P.E.I.R. 252 (Nfld. S.C.T.D.)

The defendant agreed to sell land to the plaintiff on the condition that the plaintiff would permit a third party to establish one of the boundary lines. The plaintiff and third party were already involved in a boundary dispute. The plaintiff refused to agree to the third party's positioning of the boundary line and the defendant refused to sell. The defendant pleaded section 4 of the Statute to the plaintiff's action for specific performance. Cameron J. outlined certain principles respecting the application of section 4:

> The section does not vacate the contracts but only precludes bringing an action to enforce them (*Maddison* v. *Alderson* (1883), 8 App. Cas. 467; *International Associated Hairdressers Ltd.* v. *Glasgow* (1957), 9 D.L.R. (2d) 615, at 626 (Man. C.A.)). The legal requirement of writing is not that the full agreement be in writing but only that there be a note or memorandum of the contract. The writing need only be signed by the defendant. It need not come into existence at the time of the contract (Cheshire and Fifoot's *Law of Contract* (9th Ed.), p. 186). Further, several documents may be used together to constitute a sufficient memorandum.

A written memorandum had been signed by the defendant. It referred only to the parties, the property and price. The Court held, however, that the failure to include the condition respecting the boundary line was an omission of a material term; that is, one of substance and therefore the writing requirement under the Statute had not been met. Hence the agreement was held unenforceable. As well, the Court stated that even if the contract complied with the Statute, it would have been unenforceable because of the plaintiff's refusal to comply with the agreement respecting the establishment of the boundary line.

(2) *Squires* v. *Central Trust Company* (1986), 58 Nfld. & P.E.I.R. 118 (Nfld. S.C.T.D.)

The plaintiff was the highest bidder at an auction sale of property being sold under a power of sale by the defendant mortgagee. The plaintiff deposited the required 10% of the purchase price but refused to sign an agreement of purchase and sale. After inspecting the property, the plaintiff refused to proceed with the sale and then brought an action for return of the deposit. The defendant counterclaimed for damages. The plaintiff argued that its action must succeed because of non-compliance with the *Statute of Frauds*. The Court dismissed the plaintiff's action and held that even if the Statute were applicable, the plaintiffs would not have been entitled to return of the deposit. With respect to the defendant's counterclaim, it was dismissed

on the ground that the defendant had not proven any loss suffered as a result of the breach.

Note: The fact situation in *Squires* provides a classic example of the difference between a contract which is void and one which is unenforceable thereby precluding recovery of a deposit where there is a repudiation by the purchaser. However, this would not preclude the plaintiff in *Squires* from pleading the Statute as a defence to the defendant's counterclaim for damages. That defence would have been relevant had the defendant been able to prove that it suffered damages as a result of the breach. If the Statute had been abolished as of the date of this action, then the defendant would have been able to sue the plaintiff for provable damages.

(3) *Perry* v. *Morris* (1848), 3 Nfld. L.R. 26

The defendant, by his agent, was the successful bidder at an auction sale. The auctioneer endorsed on the bidding papers the name of the defendant purchaser but omitted to include the names of the vendors. Under the terms of the sale, the successful purchaser was required to pay a deposit of 600 pounds. The plaintiff brought an action to obtain payment of the deposit. The Court dismissed the action on the ground that the contract did not disclose the names of both contracting parties.

(4) *McLean* v. *Des Barres* (1849), 3 Nfld. L.R. 84.

Same fact situation as in Perry v. *Morris*. Same result.

(5) *Millar* v. *Roach* (1879), 6 Nfld. L.R. 173

Property was offered for sale in a newspaper, particulars of which could be obtained from the trustee for the property or his attorney. An intending purchaser telegraphed the attorney asking for the lowest acceptable price. The trustee was away and the attorney telegraphed the price, which was promptly accepted by the purchaser. The trustee refused to complete the purchase and the plaintiff purchaser then sued for specific performance. It was held that the attorney did not have the authority to conclude a binding contract.

Note: The case does not turn on the writing requirement, presumably because the attorney's offer was placed in a telegram. The Court was asked to consider whether the attorney was an authorized agent as contemplated by section 4 of the Statute. The true issues focus on the law of offer and acceptance, as opposed to an invitation to treat, and the authority of an agent, be it ostensible, apparent, etc.

(6) *Hotel St. John's Ltd.* v. *Parsons et al.* (1978), 19 Nfld. & P.E.I.R. 386 (Nfld.D.C.).

The Court rejected outright the argument that the defendants were not liable for breach of an agreement for lease because the contract (letter) had not been signed by the plaintiff but rather only by the defendants.

Note: It is trite law that only the defendant, the person to be charged, need sign the memo in order to enforce the contract.

(7) *City Superette & Deli Ltd.* v. *Preston*, Nfld. T.D., August 31, 1988, Wells J. (unreported).

The plaintiff vendor sought damages from the defendant for breach of a contract of purchase and sale. One of the defences raised was lack of a sufficient memorandum in writing to satisfy the Statute. The judgment of the Court does not reveal clearly the extent to which the agreement was deficient in regard to the Statute.

Note: What is clear from the judgment is the desire of the plaintiffs to avoid the purchase of a business from someone they believed untrustworthy. The Statute was an available, but weak, defence to the action.

(8) *Maguire and Paton* v. *Patey* (1987), 66 Nfld. & P.E.I.R. 15 (Nfld. S.C.T.D.)

The applicants had purchased and made improvements to certain lands. However, they did not receive a deed from the vendor, since deceased, nor had they entered into a formal agreement of purchase and sale. In 1985 the daughter of the vendor claimed to be the owner of the property in question. The applicant then sought a declaration that they were the owners of the property. Mr. Justice Russell had "no difficulty in finding that in 1959-1960 an agreement of purchase and sale was entered into. . . ." The judgment of the Court with respect to compliance with the Statute reads:

> With respect to the *Statute of Frauds*, 29 Car. 2., c. 3, I find that the correspondence between [the vendor] and [and one of the purchasers], together with the two cheques and the wording on the same, amount to a memorandum in writing which complies with the Statute. Even if I had found that these documents did not constitute such a memorandum I would have found that by reason of the doctrine of part performance this Statute was not applicable. While it might be argued that payment of the purchase price is not in itself a sufficient act of part performance, here, possession of the property was taken and money expended in improvements. I am satisfied on the evidence that this would not have been done if no contract had been in existence. This is enough to take the contract out of the *Statute of Frauds*: See *Steadman* v. *Steadman*, [1976] A.C. 536 and *McLean* v. *Mullin* (1922), 67 D.L.R. 462.

(9) *Two Way Stores Limited and Hefferton* v. *Leonard and Castle Real Estate Limited* (1977), 16 Nfld. & P.E.I.R. 512 (Nfld. D.Ct.).

The headnote to this case offers a convenient summary of facts and issues. "This case arose out of an action by the vendors of real property against a purchaser for damages for breach of an agreement for sale. The property was owned by an individual and a company. The individual and a director of the company, who was also the trustee of all the shares of the company, signed the agreement for sale. The director and trustee did not set out the capacity in which he signed the agreement for sale. The purchaser defaulted and the property was sold to another for a lower price. The vendors brought an action against the purchaser for the difference in price. At trial at the end of the plaintiff's case the purchaser moved for a non-suit on the

ground that the company was not sufficiently described or identified in the agreement for sale to satisfy the *Statute of Frauds*. The Newfoundland District Court dismissed the motion and held that the company was sufficiently identified. On July 7, 1977, the Newfoundland District Court in an unreported judgment allowed the vendors' action for damages."

> Note: It must be acknowledged that the agreement was drafted by the purchaser. The Court applied *Miller* v. *Whelan*, (1861), 4 Nfld. L.R. 561, wherein it held that "it is not necessary that the agreement should be in any particular form, or appear in any single paper, it may be collected from several connected papers."(at p. 561)

(iii) Doctrine of Part Performance

(1) See decision of Russell J. in *Maguire and Paton* (1987), 66 Nfld. & P.E.I.R. Discussed above.

(2) *Morley* v. *Bolan* (1852), 3 Nfld. L.R. 277

The plaintiff purchaser sued the defendant vendor for specific performance in regard to an oral contract for the sale of land. While the defendant pleaded section 4 of the Statute, the plaintiff invoked the doctrine of part performance. At trial, the plaintiff's action was dismissed by Chief Justice Brady. The plaintiff then sought and was granted a rehearing (appeal) by three judges, including the Chief Justice. On the rehearing, the plaintiff was unsuccessful primarily because the plaintiff advanced arguments and issues not raised at trial. In regard to the doctrine of part performance, the decision at trial rendered by the Chief Justice provides a lucid explanation of extant law. It reflects the restricted or unequivocally referable test which would be restated some thirty years later in the House of Lords in *Maddison* v. *Alderson*:

> The ground upon which Courts of Equity have justified the exercise of the jurisdiction to enforce such parol agreements on the ground of part performance is the comprehensive powers vested in them to relieve against fraud. On this ground if one man verbally agree to purchase from another which the latter agrees to sell him, and the purchaser on the faith of that agreement and in pursuance of it builds a house upon the land or makes any other large and permanent outlay and the vendor afterwards refuses to complete the agreement, a Court of Equity will compel him to do so, although the agreement alone was void under the Statute of Frauds, because otherwise the Court would allow a fraud upon the purchaser, who, upon the faith of the agreement had made a large expenditure upon the land. But if on the other hand the part performance be such as that compensation for it can be easily ascertained, and the parties can thereby be placed in the same position as if the agreement were never made, the Court will not interfere with the express provisions of the Statute. Neither will the Court ever interfere in such cases unless it has the most convincing proof of the existence of the agreement and of its precise terms, nor will it hold any act done as a part performance unless it appear unequivocally to have been done in performance of the agreement relied on. These positions are too well settled to require a reference to any authorities in support of them.

(3) *Re Kelly*, Nfld. D.C., February 27, 1987, Halley J. (unreported)

The petitioners sought a declaration as to title of certain lands under the provisions of the *Quieting of Titles Act*. It was opposed by one adverse claimant. The property had been owned by James Kelly who died intestate. The adverse claimant was the only surviving heir of James Kelly. Despite some contradictory evidence, the Court was satisfied that in 1939 the adverse claimant "gave up all her . . . interest . . . in the property" to one Michael Kelly through whom the applicants derived their title. With respect to the Statute of Frauds, the Court stated:

> The consideration for this conveyance was the sum of Forty Dollars ($40.00). Although the agreement of purchase and sale was not in writing, I find that the Statute of Frauds was not applicable because of the doctrine of part performance in that a down-payment of Ten Dollars ($10.00) was paid to the Adverse Claimant by Michael Kelly and possession of a portion of the property was taken by Michael Kelly. *Steadman* v. *Steadman*, (1976) A.C. 536 (H.L.). There was a valid and enforceable transfer of the Adverse Claimant's interest in the property to Michael Kelly.

> Note: With due respect to the trial judge, there are two issues requiring determination. First, was there an enforceable contract for the sale of lands under section 4 of the Statute as between Michael Kelly and the adverse claimant. Second, was there a conveyance of the lands in question in which case section 1 of the Statute is applicable? It is to be noted that the Court made no reference to any decisions of the Supreme Court of Canada. Given the nature of the title dispute, it is not surprising that the applicants were able to establish adverse possession for the requisite period. Moreover, the adverse claimant was unable to persuade the court that she was tricked into signing an affidavit acknowledging Michael Kelly as owner of the lands in question.

(4) *Jenkins* v. *Strickland*, Nfld. T.D., March 12, 1990, Barry J. (unreported).

The plaintiff vendors brought an action for damages resulting from the failure of the defendant to purchase lands under an agreement of purchase and sale. The defendant pleaded that because she was illiterate, she failed to give the requisite notice of mortgage finance approval stipulated under the agreement. She also pleaded lack of proper tender by the plaintiffs. The true reason for the breach was the defendant's belief that she would be unable to make the monthly mortgage payment. Throughout the transaction the defendant was advised by her husband and the Court found that he was acting as her agent. Much of the case turned on the fact that the financing clause provided that a failure to give notice of finance approval within 10 days rendered the agreement void. Notice was given but outside the 10-day period. Moreover, both parties proceeded with the transaction until a few days before the closing. The Court found an implied agreement on the part of both parties to extend the time for the defendant to comply with the finance clause. In regard to the Statute, the Court held:

Such an implied agreement is enforceable despite the Statute of Frauds requirement that agreements concerning an interest in land are not enforceable unless in writing. While the distinction is a fine one and the cases do not all agree (see, Di Castri, *The Law of Vendor and Purchaser* (3rd. ed. 1988), Vol. 1, para. 134, fn. 41-44), this type of agreement can be viewed as one which does not vary the terms of a written agreement but simply establishes that the parties acceded to a delay in performance beyond the stipulated time.

Alternately, the Court held that the notice of mortgage approval ultimately sent to the plaintiffs was sufficient evidence in writing of the agreement to extend the time of notice of mortgage approval. "Several documents may be connected to each other by reasonable inference, with parol evidence if necessary, to constitute a sufficient memorandum of agreement to meet the Statute of Frauds requirements." *Harvie et al* v. *Gibbons* (1980), 109 D.L.R. (3d) 559 (Alta. C.A.). Finally the Court applied the doctrine of part performance. "In any event, I find that the conduct of both parties as described above constitutes a part performance of the Agreement sufficient to bring the implied agreement outside of the requirements of the Statute of Frauds. *Steadman* v. *Steadman* [1974] 2 All E.R. 977 (H.L.). I find that the Jenkins have shown that they acted to their detriment and the acts in question, arranging for a final inspection, terminating a tenant, instructing a solicitor to prepare a deed of conveyance and signing the deed, when viewed in the context of their Real Estate Agent having been informed of the mortgage approval by the Strickland's Agent, show on a balance of probabilities that the acts had been performed in reliance on an agreement with the Defendant to extend time, which is consistent with the implied agreement alleged. *Steadman*."

Note: Another way of characterizing the financing issue is whether an oral variation of a written contract is enforceable. The weight of authority suggests that the variation would be unenforceable: see M.J. Bridge. The *Statute of Frauds and Sale of Land Contracts* (1986) 64 Can.Bar.Rev. 58 at p. 82. On the other hand, an oral variation may be used as a defence by invoking the doctrine of waiver or promissory estoppel. The defendants waived their right to avoid the contract by representing that the contract subsisted. The plaintiff acted to its detriment by conducting himself in the manner outlined by the trial judge.

It is to be noted that no reference is made to any Supreme Court of Canada decision.

(5) *655 Developments Ltd.* v. *Browning Harvey Ltd.* (1989), Nfld. & P.E.I.R. 175 (Nfld. S.C.T.D.)

The defendant, a distributor of Pepsi Cola, had agreed orally with two tenants in a strip mall, owned by the plaintiff, to install a sign over each of their premises. In return, the tenant agreed to sell exclusively the defendant's product. However, the signs were to remain the property of the defendant. Ultimately, the tenants vacated the premises while still owing the plaintiff landlord rent. The plaintiff would not allow the defendant to remove the signs maintaining that they were fixtures and thus no longer the property of

the defendant. Subsequently, the defendant hired a contractor to remove the signs during the early hours of a Sunday morning. The plaintiff sued the defendant in conversion and trespass. The Court concluded that the signs were chattels and not fixtures and thus the action in conversion was dismissed. The Court did award punitive damages against the defendant for trespass to lands. One of the arguments advanced by the plaintiff was that since the lease was to be performed for a period in excess of a year, it was unenforceable under the Statute of Frauds and, therefore, the defendant could not rely on the oral agreement to claim a right to have the signs returned. The Court held that the oral lease was enforceable under the doctrine of part performance. Performance by the two tenants of their contractual obligations to the defendant rendered section 4 of the Statute inapplicable.

Note: Even if the doctrine of part performance were not applicable, the Statute does not effect the right of the defendant to regain possession of its chattels. To hold otherwise would be to declare, for example, that a real estate agent has a right to a deposit which has been forfeited under an unenforceable contract for the sale of lands. A purchaser not in breach of the agreement has a right to the deposit regardless of the unenforceability of the oral contract. Correlatively, a lessor of chattels has a right to regain possession of chattels under an unenforceable lease. Finally, it is to be noted that the Statute does not apply to a lease of chattels.

(6) *Baker* v. *Neary and Baker* (1984), 51 Nfld. & P.E.I.R. 25 (Nfld. S.C.T.D.).

A father, prior to his death, made an oral promise to transfer land to his son. The parties agreed that the testator had intended that the son obtain the land. They disagreed, however, on whether that promise was conditional on the land being needed by the son in connection with a greenhouse business which, at one time, the son had intended to commence on adjoining land. The Court found that there was no condition attached to the promise. Nonetheless, the action failed because the agreement was not in writing pursuant to section 4 of the Statute. Moreover, the court held that the act of surveying the lot in question at a cost of $200 did not constitute sufficient acts of part performance to take the agreement outside the Statute. Finally, the Court held that even if the agreement satisfied the Statute, it was unenforceable because there was no consideration on the part of the son to support the agreement.

Note: While Section 4 does not apply to gifts of land, the same is not true in regard to section 1 of the Statute which imposes a writing requirement in regard to conveyances of land or interests therein.

(iv) Summary

The cases make it difficult to argue that the Statute has worked an injustice on a party to an oral contract for the sale of land. On the other hand, it is obvious that the Statute is frequently raised as a technical defence,

which Newfoundland courts have circumvented. As in the case of guarantees, it can be said that had the Statute been abolished, the cases analyzed above would have been decided no differently. By way of reply, one might query whether the reported cases reflect only those instances in which the plaintiff is assured of success notwithstanding the Statute. So it remains to ask whether the Statute's true impact is to discourage frivolous claims by potential plaintiffs. However, where a defendant will be unjustly enriched or the plaintiff has suffered a financial loss as a result of reasonable reliance on an unenforceable oral agreement, it is easy to understand why a plaintiff would continue with an action notwithstanding the obstacle presented by section 4 of the *Statute of Frauds*.

7. Arguments for and Against Retention of Writing Requirement

Can one conclude that non-abrogation means that there must be advantages in retaining a writing requirement? This portion of the Discussion Paper mirrors other law reform papers in that both positive and negative aspects of the writing requirement are examined. Initially, it is beneficial to appreciate the legal realities which prompted passage of the Statute in 1677. Thereafter, the important functions served by a writing requirement are examined, which functions were identified by Lon Fuller in his seminal article of 1941.[108] Lastly, the overall efficacy of the Statute is reviewed.

A. Historical Background

The *Statute of Frauds* was enacted as "An act for prevention of Frauds and Perjuryes."[109] Its aim was to prevent those transactions which were never concluded from being given legal effect, and to protect people from being held to promises never made, but supported by perjured evidence.[110] This was achieved by requiring written evidence of certain conveyances, contracts, promises, trusts and wills. Though the Statute also effected changes in other areas of the law, they are considered peripheral to the main purpose of the enactment.[111] The legal conditions of the late 17th century demanded passage of the *Statute of Frauds*; principally the role of juries and the law of evidence:[112]

> The process of the evolution of the jury, from a tribunal where the jurors were witnesses and decided the facts in cases on their own knowledge, to a tribunal where the jurors were judges of the facts and decided cases on evidence given in open court, was just about completed. . . .

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108 L. Fuller, *Consideration and Form* (1941), 41 Col. L. Rev. 799 , at p. 800 *et seq.*
109 See Chapter 1.
110 H.E. Willis, *The Statute of Frauds - A Legal Anachronism* (1928) 3 *Indiana L.J.* 427.
111 Holdsworth, *History of English Law*, (London: Methuen & Co. Ltd., 1924) Vol. VI, 384-386.
112 Willis, *supra*, note 110, at p. 429.

However, absence of judicial control enabled a jury to decide a case on the basis of the personal knowledge of individual jurors.[113] Requiring written evidence as proof of various conveyances and contracts limited the ability of juries to resort to facts not before the court.[114] To make matters worse, there was neither a systematic nor coherent law of evidence. There were no settled rules regarding parol evidence and neither the parties to an action, their spouses nor anyone having an interest in the litigation were competent to testify.[115]

> Such a state of the law of evidence was temptation to plaintiffs to procure perjured testimony, and exposed defendants to outrageous liabilities; and it probably was in this state of the law a wise precaution to require for such liability, either writing or other adequate evidence, at least where it was feasible to do so in the case of contracts.[116]

Willis cites the rudimentary state of contract law in the late 17th century as a major contributor to the enactment of section 4.[117] Today, commentators believe that these sections prescribe formalities in an area now adequately covered by modern contract law.[118] Others have gone so far as to maintain that part of the *raison d'etre* of the Statute is found in the conditions of social and political uncertainty attending the rapid succession of the Civil War, the Cromwellian dictatorship and the Restoration.[119] Apparently, such conditions made citizens extremely litigious and "encouraged unscrupulous litigants to pursue false and groundless claims with the help of manufactured evidence.[120] Rabel feels the foregoing factors are only some of the considerations that prompted the *Statute of Frauds* and that it would be incorrect to say that the Statute arose only from such conditions.[121] Similar statutes were enacted contemporaneously in France, Germany and Italy. In response to a number of influences, informal verbal agreements were gradually being recognized, so that the general attitude in England and Europe prior to the Statute was that verbal contracts were acknowledged to be legally valid. However, this development was opposed by two retarding factors: (1) the inherent conservatism of transactions and (2) the fact that merchants everywhere continued to use written documentation in the form of official registers, records of brokers and notarial instruments. Because relaxation of the requirement for written promises created a constant danger of perjury by conspiracy and subordination, Rabel

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113 R.E. Ireton, *Should We Abolish the Statute of Frauds* (1938), 72 *U.S. Law Review* 195; E. Rabel, *The Statute of Frauds and Comparative Legal History* (1947) 63 *L.Q. Rev.* 174.

114 Willis, *supra*, note 110, at p. 430.

115 See *supra*, note 113 and J.M. Perillo, *The Statute of Frauds in Light of the Functions and Dysfunctions of Form* (1974) 43 *Fordham L.Rev.* 39.

116 Willis, *supra*, note 110, at p. 430.

117 *Ibid.*, at p. 431.

118 E.g., Bridge, *supra*, note 48 and G.H.L. Fridman, *The Necessity for Writing in Contracts Within the Statute of Frauds*, (1985) *U. Toronto L.J.* 43.

119 M.A. Franklin, *Notes--Legislation* (1955), 40 *Cornell L.Q.* 581; and Rabel, *supra*, note 113.

120 *Cheshire and Fifoot's Law of Contract*, *supra*, note 41 at p.175.

121 Rabel, *supra*, note 113.

writes that: "The situation seemed to call for statutory redress. Experienced lawyers wanted wisely to restrict the use of informal transactions."[122] It is trite to note that the social and legal milieu underpinning the Statute bears little resemblance to the legal and commercial exigencies of the late twentieth century.

B. Functions of the Statute's Writing Requirements

(i) Evidentiary Function

The evidentiary function of the Statute's writing requirement was the basic aim of its draftsmen.[123] The Statute required cogent evidence, in the form of signed documents or memoranda, as a prerequisite to the enforcement of particular transactions.[124] Over the past 300 years, legal systems have clung tenaciously to the Statute and its prescribed formalities suggesting that there is a need.[125] Is the Statute's primary function still an evidentiary one and does it serve that role in the present legal system? Two supporting arguments are that it further reduces the risk of fraud and obviates resort to human memory since the writing satisfies the best evidence rule.[126]

Most commentators believe that any evidentiary function currently served by the Statute's writing requirement is minimal at best.[127] It is felt that the Statute has become dysfunctional and actually promotes fraud by allowing a party to admit to making an oral agreement but plead the Statute as a defence against the enforcement of the agreement.[128] The support of fraud is thought to undermine any present evidentiary function served by the Statute. In addition, only a very limited list of transactions are covered by the Statute - those deemed important in 1677 - so any present evidentiary function is said to be both patchy and outdated.[129]

(ii) Cautionary Function

Written formalities prescribed by the *Statute of Frauds* may also serve a cautionary function "by acting as a check against inconsiderate action."[130] The stipulation that the party to be charged sign the note or memorandum reinforces this cautionary purpose, operating in a manner similar to the role once played by the seal.[131] A statutory provision requiring a party to put a transaction, contract, or promise in writing checks

122 *Supra*, note 113, pp. 177-178.
123 Perillo, *supra*, note 115.
124 *British Columbia Report*, *supra*, note 45, at p. 52.
125 Bridge, *supra*, note 48.
126 *Ibid.*
127 Including Bridge, *supra*, note 48.
128 R.S. Stevens, *Ethics and the Statute of Frauds* (1952), 37 *Cornell L.Q.* 355; and see e.g., *Seivewright v. Archibald* (1871), 17 Q.B. 103.
129 This aspect is discussed more fully in the *British Columbia Report*, *supra*, note 45, at p. 7.
130 Fuller, *supra*, note 108.
131 See generally Bridge, *supra*, note 48.

inconsiderate action in a number of ways. Arguably it can help distinguish true and binding promises from expressions of hopeful expectations. For example, Perillo maintains that in a promise to guarantee the debt of a friend or family member, form requirements increase the opportunity for reflection upon the wisdom of taking on the burden of another's obligations and help the guarantor view the possible default of the friend as a genuine risk rather than a remote possibility.[132] Form requirements are also said to serve a cautionary purpose by limiting the enforcement mechanisms of the legal system to those transactions that are the result of a deliberate and serious act of volition.[133] Hence it is argued that cautionary functions of form are important and useful where transactions are personally important or financially substantial (e.g. those involving land). The objective being to ensure that lay people do not inadvertently enter into unintended legal commitments.[134]

Although the *Statute of Frauds* can fulfil a cautionary function, to the extent that it encourages written transactions, some argue that it serves this function in a rather irrational and arbitrary manner. A party to an agreement can write a letter repudiating the agreement but pursuant to the Statute and case law, this repudiation can serve as written evidence of the existence of the agreement.[135] Fridman feels too much emphasis is given to the cautionary functions of writing requirements since many people:[136]

> . . . do not take any more care about contracting because the contract is written or is contained more or less in some written form than they do or would if the contract were merely oral.

Bridge, on the other hand, notes the common lay belief that contracts should be in writing and if they are not in writing they do not count. It would not be unfair to add that most solicitors conduct their client's affairs on that basis. Reality and practicality are factors which cannot be ignored lightly.[137]

(iii) Channelling Function

Legal formalities can also serve a channelling function by indicating to the parties that negotiations have concluded and that they have entered into an enforceable undertaking.[138] Compliance with the writing requirement also signals to both the external and legal community that the parties intend to be legally bound. Nonetheless, it is argued that formal requirements prescribed by the *Statute of Frauds* do not adequately fulfil the channelling function for several reasons. Fridman contends that a written transaction

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132 See Perillo, *supra*, note 115.
133 *Ibid.*
134 Bridge *supra*, note 48 and Fridman, *supra*, note 118.
135 See *supra*, note 51.
136 Fridman, *supra*, note 118, at p. 50.
137 See *Ontario Report*, *supra*, note 11, at p. 95.
138 Perillo, *supra*, note 115.

does not always generate careful consideration and bring home to a party that he or she is legally bound.[139] A channelling function is best served if a high degree of formalism is required and if there is a clear and positive rule to determine when the contract or transaction is complete. On the other hand, the Statute's writing requirement allows the use of an incomplete memorandum and permits joinder of several documents linked by parol evidence.[140] Writing sufficient to satisfy the *Statute of Frauds*, therefore, does not necessarily eliminate the uncertainty as to whether parties have left the area of preliminary negotiations.[141] Furthermore, the Statute does not provide that compliance with its terms will render an agreement enforceable; it only stipulates that non-compliance makes the agreement unenforceable. Thus, it is maintained that to properly serve a channelling function, prescribed formalities should clearly separate legally effective transactions from void ones.[142]

Is the channelling aspect of the formalities prescribed by the *Statute of Frauds*, worth reforming? Bridge highlights the progression towards an increasing enforcement of contracts in spite of diffuse and imprecise negotiations, uncertainties of agreement and the joinder of written and informal evidence:[143]

> [A]t a time when the whole movement of the law of contract is towards an expansion of the legally relevant, with the parol evidence rule coming under increasing fire and collateral warranties being increasingly tolerated, any attempt to enforce the channelling function of forms would be tantamount to turning back the clock.

C. Major Criticisms of the Statute

What then are the major criticisms of the Statute? These range from criticisms aimed specifically at the *Statute of Frauds*, to disadvantages of writing requirements in general. The backbone of the list was compiled by the English Law Revision Committee in its 1937 *Report on the Statute of Frauds and the Doctrine of Consideration*.[144] It has been repeated and amplified by a host of writers and law reform committees since then.[145]

As noted earlier, the Statute was enacted in response to a set of historical conditions no longer extant. The legal loopholes the Statute was designed to remedy have gone. For example, parties to lawsuits, their spouses, and those with an interest in the litigation can now freely testify and be examined and

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139 Fridman, *supra*, note 118.
140 Bridge, *supra*, note 48.
141 Perillo, *supra*, note 115.
142 *Ibid.*
143 Bridge, *supra*, note 48, at p. 68.
144 Report of the English Law Revision Committee (Cmd. 5449), 1937, reprinted in 15 *Can. B. Rev.* 585. The Committee dealt only with sections 4 and 17 of the *Statute*.
145 E.g.: Alberta Background Paper *supra*, note 1; British Columbia Report, *supra*, note 45; Bridge, *supra*, note 48; Fridman, *supra*, note 118.

both the role of juries and their use in civil matter is greatly diminished. The *Statute of Frauds* was drafted and flourished in an age when there was greater dependence on the "four corners" of the written document. But, wide-ranging developments in the law of evidence and in contract law have greatly increased the informality of court procedure and decreased reliance on the written word as evidence. In determining if an agreement has been completed, a wide range of informal dealings, utterances and understandings are considered in order to supplement written evidence.[146]

One of the most damning criticisms of the Statute is that it promotes more fraud and injustice than it prevents by allowing people to avoid bargains they have made (with full intention of being bound) but not reduced to written form.[147] Although no reports of empirical evidence prove conclusively that the Statute has created more injustice than it has prevented, one commentator has concluded that, in the vast majority of cases, it has been pleaded as an afterthought, often in preference to a defence that was less easy to establish.[148]

The tension between the Statute's prescribed form requirements and attempts to maintain justice in individual cases has been said to produce myriad creative judicial solutions and precedents "which can be distinguished from an 'ordinary' case only by tortuous logic devoid of common sense or policy content."[149] Although the guiding principle seems to be that the court will try to prevent the Statute being used as a vehicle of injustice, it is said to be at the expense of certainty in the law.[150] Uncertainty it is said, has contributed to substantial litigation at tremendous private and public cost.[151] Obviously, it is impossible to measure how many cases have been saved by the Statute; that is, not initiated because the Statute provided a complete defence.

Another widely cited criticism of the *Statute of Frauds* is that it is out of accord with actual business practice. The prescription of a general requirement of writing is in conflict with the way transactions covered by the Statute are normally effected. However, the Alberta Institute of Law Research and Reform notes that this criticism is applicable to some provisions of the Statute more than others:[152]

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146 See generally, Bridge, *supra*, note 48.
147 In addition to the sources cited in note 166, this criticism has also been discussed in Ireton, note 113; Stevens, *supra*,note 128; and H.W. Wilkinson, *The Law of Property Act 1925, s.40: A Case for Abolition*, (1967) 31 *Convey. Prop. Law* 182.
148 Bridge, *supra*, note 48.
149 Perillo, *supra*, note 115, at p. 71.
150 Fridman, *supra*, note 118 and Wilkinson, *supra*, note 147.
151 This criticism is noted in the Alberta Report, *supra*, note 10 and Bridge, *supra*, note 48.
152 Alberta Background Paper, *supra*, note 1, at p. 12.

> [I]t would seem likely that the vast majority of conveyances of land, contracts for the sale of land, guarantees and express creations of trusts are in fact in writing.

But it is unlikely that transactions involving contracts not to be performed within one year are regularly put in writing.[153]

The fact that some sections of the Statute are in conflict with business practice does give rise to a corollary criticism noted earlier. Formalities are prescribed only for those transactions deemed important in 1677. Transactions we deem significant today fall outside the Statute.

It has been said that writing requirements, especially when they pertain to contracts, are a restriction on the sovereignty of individual will and an interference with freedom of contract.[154] A fundamental tenet of the law of contract is that effect should be given to the sincere intentions of contracting individuals and to promises, whether oral or not. A writing requirement, such as that stipulated by the *Statute of Frauds*, allows a party to escape from the consequences of a genuine bargain by reliance on a technicality.[155] Requirements for writing have also been criticized as being inconvenient and cumbersome, as slowing the progress of business and costing additional time and money.[156] Because statutorily prescribed formalities are often unknown by the general public, they have been condemned as being obscure, arcane, esoteric and overly complex. More importantly, people do not adhere to laws of which they are unaware and are reluctant to heed formalities they find unnecessary, burdensome, or contrary to the usual mode of doing business.[157]

8. Existing Reform Proposals/Recommendations

This part of the discussion paper outlines existing reform proposals in regard to both contracts of guarantee and land contracts. As well, the analysis includes a personal recommendation as to the proper fate of the writing requirement as it applies to each category. The recommendations are intended to generate debate.

A. Contracts of Guarantee

Of those law reform bodies that have examined the matter of guarantees, the majority concluded that the writing requirement should be retained, in

153 *Ibid.*, and Fridman, *supra*, note 118.
154 Perillo, *supra*, note 115.
155 *Ibid.*, and Alberta Institute of Law Research and Reform, *The Statute of Frauds and Other Requirements of Writing: Memorandum for Discussion* (1979); (hereafter referred to as the Alberta Memorandum).
156 *Ibid.*
157 Alberta Memorandum, *ibid.*, and J.F. Stephen, *Section Seventeen of the Statute of Frauds* (1885), 1 L.Q. Rev. 1.

one form or another. Usually, the rationale offered by the English Law Revision Committee is cited in support of that recommendation:[158]

> [I]f oral contracts of guarantee are allowed, we feel that there is a real danger of inexperienced people being led into undertaking obligations that they do not fully understand, and that opportunities will be given to the unscrupulous to assert that credit was given on the faith of a guarantee which in fact the alleged surety had no intention of giving . . . . [T]he necessity of writing would at least give the proposed surety an opportunity of pausing and considering, not only the nature of the obligation he is undertaking, but also its terms . . . . [I]n the vast majority of cases the surety is getting nothing out of the bargain; hence the greater reason for securing, if possible, that no mistake shall occur.

If a writing requirement is warranted, then the question is whether that requirement should apply to contracts of indemnity. The Ontario Law Reform Commission had no difficulty in recommending their inclusion.[159] As for the definition to be provided for guarantee, the Ontario solution of retaining the original language of section 4 along with the benefit of existing case law, avoids a multitude of issues.[160] It is more difficult to determine whether all guarantees should be in writing and correlatively to circumscribe the minimum contents of a document which will satisfy that requirement. Finally, it must be decided whether relief should be available in cases of non-compliance.

The retention of a writing requirement for contracts of guarantee is based on a need to protect consumers believed to be unsophisticated in 'commercial' matters. Of course, not everyone who guarantees the obligation of another falls into that category. The Ontario Report recommends that guarantees given by a person in the course of business be excluded.[161] Thus a guarantee given by a shareholder, officer or director of a company with respect to an obligation incurred by that company, would not be subject to the writing requirement. The exemption would also extend to guarantees given in a wholly domestic or other non-business context, that is: "... where a guarantee is given by a person otherwise than in the course of business to a person acting in the course of business". If consumer guarantees are to be evidenced in writing, then the minimum amount of information to be contained therein must be predetermined. The Ontario Report recommends against a stringent writing requirement on the ground that it would "encourage unmeritorious defences".[162] The Report states that, "... the writing should identify the parties and reasonably indicate that a guarantee or indemnity is being or has been given ..."[163] In the case of non-com-

158 Sixth Interim Report (Statute of Frauds and the Doctrine of Consideration) (Cmd.-5449, 1937) at p. 33, *supra*, note 144, at p. 617.
159 Ontario Report, *supra*, note 11, at p. 113.
160 *Ibid.*
161 *Ibid.*, at p. 114.
162 *Ibid.*

pliance, no relief would be available. The Ontario Commission was not prepared to extend relief on the basis of acts of part performance, principally because the protective and cautionary functions of the writing requirement would be defeated. Since the writing requirement would apply only to consumer guarantees, a failure to comply would not work an injustice even if the other party were to act to his or her detriment.[164]

While the Ontario proposal builds upon earlier reform papers and legislative schemes, it essentially rejects the imposition of a writing requirement except where the guarantee or indemnity is given by inexperienced persons, the so-called consumer. The review of Newfoundland case law undertaken herein revealed that the repeal of the Statute would not have worked an injustice on a party and indeed would have avoided "unmeritorious defences". Nonetheless, it would be improper to recommend abrogation of written guarantees under the Statute without considering replacement legislation. Whatever benefit accrues to a guarantor because of the writing requirement, it does in theory provide a modicum of protection to those who agree to accept responsibility for the obligation of another. However, it is apparent, that not all persons require legislated protection, but rather only those who come within the so-called consumer category. It is recommended that section 4 of the Statute as it pertains to guarantees be repealed and that replacement legislation be enacted. Such legislation should also embrace contracts of indemnity. Moreover, if such legislation is to be efficient, it should encompass more than a writing requirement. For example, consideration should be given to spousal guarantees securing the pre-existing indebtedness of a husband whose business is about to be placed in receivership. It is a proper function of the legislature and law reform bodies to at least acknowledge such problems, regardless of whether a legislative solution is deemed a realistic or practical option. One cannot always turn to common law doctrines to protect the weaker parties to a transaction. We have over thirty years experience with consumer legislation in Canada with corresponding benefits to affected parties.

It must be acknowledged that if consumer legislation in regard to guarantees is deemed unnecessary, then arguably there is very little need to retain a writing requirement which would conceivably enable a sophisticated guarantor to avoid liability. Moreover, it must be acknowledged that the more onerous guarantees are of the written variety. Therein, for example, lenders are able to impose terms which relieve them of legal responsibility for acts for which they would otherwise be held accountable.[165] Ironically, in many instances, guarantors would be better served if they refrained from signing a written document and rested their obligation on an oral promise.

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163 *Ibid.*
164 *Ibid.*, at p. 115.
165 See *Bank of Montreal* v. *Bauer*, [1980] 2 S.C.R. 102.

B. Land Contracts

Despite the willingness of reformers to criticize section 4 of the Statute, no one has been willing to recommend its abrogation for land contracts.[166] In one form or another, land contracts remain subject to either a writing requirement or some other indicia that the parties reached an agreement. As to the possible reform options, there are three outlined in the Ontario Report.[167] First, the writing requirement in regard to land contracts could be repealed without qualification. Second, the writing requirement and the law surrounding it could be reformed generally to eliminate existing weaknesses and criticisms. Finally, the Ontario Report outlines the possibility of repealing the writing requirement, "subject to the proviso that a contract concerning land would not be enforceable unless the plaintiff's claims were corroborated by some other material evidence." Those reluctant to abandon a writing requirement may well find this option appealing.

(i) Abrogation

It is reasonable to hold that if the Statute's writing requirement is regarded as a source of injustice, then the most effective resolution would be repeal. Law reformers, however, have been unwilling to advocate such a drastic change in law and practice. The Manitoba Law Reform Commission's reasoning should not take anyone by surprise.[168]

> The best reason for re-enactment, in our view, is that it maintains consistency in the law of real property. It is a well-established and accepted tradition in the common law that all dealings in land must be evidenced in writing.

That approach is not fresh but antithetical to the position ultimately adopted by the Manitoba Legislature. In 1983, it repealed the Statute of Frauds in its entirety.[169] Has abrogation materially effected real estate practices or generated litigation encompassing issues which would not have arisen had a writing requirement been retained? The answer to both questions would appear to be no. In this regard, the 1989 decision of the Manitoba Court of Appeal in *Megill-Stephenson Company Ltd.* v. *Woo*,[170] is instructive.

In that case, the plaintiff purchaser had submitted a written offer to the defendant vendor. That offer was not accepted in writing and the parties, through the efforts of a real estate agent, continued to negotiate with respect to allocation of purchase price and the postponement of a mortgage back to the vendor. The negotiations were conducted over the telephone. Sub-

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166 See Alberta Background Paper, *supra*, note 1 at p. 140 which provides a summary of reform efforts in the various commonwealth jurisdictions and the provinces.
167 *Supra*, note 11, at pp. 104.
168 See *Manitoba Report*, *supra*, note 15, at p. 35.
169 *An Act To Repeal The Statute of Frauds* S.M. 1982-83-84, c. 34.
170 (1989), 58 Man. R. (2d) 302 (C.A.).

sequently the vendor received and accepted a higher offer. The plaintiff argued that the parties had reached a binding oral agreement over the telephone prior to the sale to the third party. At trial, the plaintiff's action was dismissed on the ground that the evidence did not support a finding that a concluded contract had been reached. The Court of Appeal found that even if the parties had reached an agreement with respect to the essential terms of the contract, that it was not binding as the sale was subject to approval by the vendor's solicitor. At the same time, the Court of Appeal took the opportunity to comment on the effect of the repeal of the *Statute of Frauds* on land contracts.[171]

> While the Statute of Frauds has been repealed in this jurisdiction, the idea lying behind it remains valid. The courts should be reluctant to impose binding contracts on parties based upon conversations, particularly where the usual practice has been to reduce such contracts into writing. In spite of the repeal of the *Statute of Frauds*, the practice in dealing with the purchase and sale of land is to have the contracts in written form, and that was the obvious expectation between the parties in this dispute. Indeed, the expectation of Woo was that the contract would be reduced into writing and would have no binding legal impact until signed by him. And the signing, of course, would take place only after the contract was reviewed and approved by his solicitor.

It would appear that the repeal of the Statute in Manitoba has not generated frivolous actions by plaintiffs seeking to establish oral contracts for the sale of land. Indeed, the *Megill* case appears to be the only reported decision since 1983 in which a party has sought to establish an oral contract as between parties dealing at arm's length with one another; that is land contracts effected through the services of a real estate agent. On the other hand, non arm's length or domestic oral agreements can be enforced in Manitoba without having to employ doctrines such as part performance and without having to determine the sufficiency of such acts. It is recommended that this aspect of section 4 of the Statute of Frauds be repealed and that no replacement legislation be enacted.

Undoubtedly legal practitioners will balk initially at this recommendation. The work of solicitors is inevitably tied to land transactions in which the notion of a "done deal" is the written contract. As for members of the public, it is generally well understood that once the irrevocable offer (supported by consideration in the form of a seal) is accepted in writing, the contract is one which gives rise to potential liability for a recalcitrant party. What is too often forgotten is that you do not need the signatures of both parties to a contract to render it enforceable, but only the person to be sued. The irony of it all is that a vendor could orally accept an irrevocable offer in writing from a purchaser and sue the purchaser for specific performance.

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171 *Ibid.*, at p. 306.

Alternatively, the vendor could renege on the deal and plead section 4 of the Statute. It is highly improbable that, given an executory contract for the sale of land, the plaintiff will be able to invoke the doctrine of part performance. Notwithstanding that recommendation, there are two additional reform options available and to be acknowledged.

(ii) Reform of the Writing Requirement

The fear of adverse effects stemming from repeal of the writing requirement has resulted in recommendations seeking to eliminate existing deficiencies in the law. Thus where the writing requirement is retained, it is reformulated to clarify what is necessary to satisfy that requirement. One option is to impose a minimum content requirement, e.g., price, parties description of land. An even less stringent reform option is to require a writing which establishes the existence of some contract involving land. Equally important in the reform equation is the selection of the appropriate test for determining sufficiency of acts of part performance. In this regard, reform initially rejects the unequivocal referable test. A concrete example of reform of this nature is found in British Columbia's *Law and Equity Act*:[172]

> 54.-(3) A contract respecting land or a disposition of land is not enforceable unless
>
> (a) there is, in a writing signed by the party to be charged or by his agent, both an indication that it has been made and a reasonable indication of the subject matter
>
> (b) the party to be charged has done an act, or acquiesced in an act of the party alleging the contract or disposition, that indicates that a contract or disposition not inconsistent with that alleged has been made, or
>
> (c) the person alleging the contract or disposition has, in reasonable reliance on it, so changed his position than an inequitable result, having regard to both parties' interests, can be avoided only by enforcing the contract or disposition.
>
> (4) For the purposes of subsection (3)(b), an act of a party alleging a contract or disposition includes a payment or acceptance by him or on his behalf of a deposit or part payment of a purchase price.

The British Columbia statute also contains a supplemental provision to the following effect

> 54.-(7) A writing can be sufficient for the purpose of this section even though a term is left out or is wrongly stated.

Under the British Columbia solution, a land contract remains unenforceable unless: the defendant has signed a document (it need not contain all

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172 R.S.B.C. 1979, c. 224.

the terms of the agreement); it can be shown that the defendant has acted in a manner consistent with the alleged contract; or the plaintiff, in reliance on the oral contract, has acted to his or her detriment and injustice can only be avoided by enforcing the contract. What is to be noted is that sub-paragraphs (a) and (b) are directed at establishing proof that an agreement was reached while paragraph (c) renders enforceable an alleged contract solely on the basis of reasonable reliance by the plaintiff. Such reliance will render enforceable what otherwise would not be regarded in law as a binding contract. But, it is precisely that kind of ambiguity which dictates against statutory reform of nearly three centuries of multi-layered jurisprudence. The Ontario Report offers an extensive analysis of the British Columbia reform solution.[173] It identifies ambiguities generated by the provisions of the *Law and Equity Act*, and thus redirects attention from criticisms of the existing law to that of the statutory solution. On the other hand, the British Columbia solution may be perceived as liberalizing the writing requirement to such an extent that it poses no threat to the enforcement of otherwise valid contracts. The Manitoba solution may have been thought to be reactionary, but the present evidence attests to the astuteness of its legislature.

(iii) The Compromise Solution - Corroboration By Material Evidence

The Ontario Law Reform Commission rejected both of the foregoing options and in their stead recommended that: "a contract relating to land not be enforceable on the evidence of the party alleging the contract unless evidence is corroborated by some other material evidence".[174] Under this proposal, a contract would be enforceable if, for example, the defendant has signed a writing or the plaintiff has undertaken acts of part performance. The Ontario Commission concludes: "The principal merit of the third option is that it simplifies the law and puts it on a principled and consistent basis."[175] Notwithstanding the attractiveness of this solution, there remains what constitutes sufficient corroboration. Presumably, an oral executory contract for the sale of land is unenforceable even if the court deems the plaintiff to be the only credible witness. The Ontario Commission believed that proof of land contracts could be met easily under its proposal. If that is so, then it is but a small step to reform from imposing any criterion for enforceability of land contracts. The Courts are capable of determining whether or not the parties had reached an agreement. Nonetheless, those concerned with the possibility of a party initiating a frivolous action in which an oral agreement is alleged may, however, be placated by the corroboration solution. It is preferable to the reform solution adopted by the British Columbia legislature.

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173 *Supra*, note 11, at pp. 107-8.
174 *Ibid.*, at p. 109.
175 *Ibid.*, at p. 110.

CHAPTER 3

CONVEYANCES OF INTERESTS IN LAND SECTIONS 1-3

'For prevention of many fraudulent Practices, which are commonly endeavoured to be upheld by Perjury and Subornation of Perjury,' Be it enacted by the King's Most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the Authority of the same, That from and after the four and twentieth Day of June, which shall be in the Year of our Lord One thousand six hundred seventy and seven, all Leases, Estates, Interests of Freehold, or Terms of Years, or any uncertain Interest of, in, to or out of any Messauges, Manors, Lands, Tenements or Hereditaments, made or created by Livery and Seisin only, or by Parol, and not put in Writing, and signed by the Parties so making or creating the same, or their Agents thereunto lawfully authorized by Writing, shall have the Force and Effect of Leases or Estates at Will only and shall not either in Law or Equity be deemed or taken to have any other or greater Force or Effect; any Consideration for making any such Parol Leases or Estates, or any former Law or Usage, to the contrary notwithstanding.

II. Except nevertheless all Leases not exceeding the Term of three Years from the making thereof, whereupon the Rent reserved to the Landlord, during such Term, shall amount unto two-third Parts at least of the full improved Value of the Thing demised.

III. And moreover, That no leases, Estates or Interests, either of Freehold, or Terms of Years, or any uncertain Interest, not being Copyhold or customary Interest, of, in, to or out of any Messuages, Manors, Lands, Tenements or Hereditaments, shall at any Time after the said four and twentieth; Day of June be assigned, granted or surrendred, unless it be by Deed or Note in Writing, signed by the Party so assigning, granting or surrendring the same, or their Agents thereunto lawfully authorized by Writing, or by Act and Operation of Law.

1. Introduction

Chapter 2 examined the writing requirement applicable to contracts to create interests in land under section 4 of the *Statute of Frauds*.[1] This Chapter focuses on the writing requirement in regard to the conveyance itself. While most conveyances follow an oral or written contract of purchase and sale, some evidence a gift of lands. Several law reform agencies have dealt with the possibility of parties effecting an oral conveyance of land and hence whether the Statute's writing requirement should be repealed. It is has been assumed that abrogation of the Statute's writing requirement would validate oral gifts of land. The position adopted herein is that abrogation of sections

1 29 Car. II, c.3.

1 and 3 of the Statute would not validate oral conveyances of freehold estates in fee simple. In support of that position, an overview of conveyancing law in the Province is required and, in particular, with respect to the perceived effect of the *Chattels Real Act*.[2] It is argued that in strict legal theory, conveyancing documents presently used in Newfoundland are ineffective for transferring ownership of fee simple estates. That opinion, of itself, should generate a renewed interest in Newfoundland property law.

While a recommendation in regard to abrogation of the writing requirement as it impacts on conveyances of freehold interests is offered, it would be premature to make a specific recommendation on the proper disposition of the writing requirement in the leasehold context. Without knowing the fate of the writing requirement for contracts to convey, including agreements for lease, it is pointless to speculate on the appropriate reform solution.

2. The Writing Requirement

In some instances, the arcane language of sections 1 to 3 of the Statute makes it difficult to appreciate their precise meaning. The problem of construction is exacerbated by the fact that most jurisdictions have enacted replacement legislation which eliminates the vagaries associated with the terminology of 17th century property law. Acknowledging that problem, the following analysis identifies those aspects which appear contentious, even though they have not proven to be problematic in practice.

The writing requirement in section 1 of the Statute, embraces the creation of estates or interests in land *de novo*. The interest conveyed must be put in writing and signed by the party creating the interest or by an authorized agent. A conveyance which does not comply with this section is deemed an estate at will; that is, an estate determinable at the will of the person creating the interest. Section 1 provides:

> ...All Leases, Estates, Interests of Freehold, or Terms of years, or any uncertain interest of, in, to or out of any Messuages Manors Lands Tenements or Hereditaments made or created by Livery and Seisin only or by Parol and not put in Writing and signed by the parties so making or creating the same, or their Agents thereunto lawfully authorized by Writing, shall have the force and effect of Leases or Estates at Will only and shall not either in Law or Equity be deemed or taken to have any other or greater force or effect; any consideration for making any such Parol Leases or Estates or any former Law or Usage, to the contrary notwithstanding.

It is accepted that the creation of life estates and leasehold estates falls within section 1 of the Statute. It is less certain whether conveyances of fee simple

2 4 Wm. 4, c.18 (Nfld.), now R.S.N. 1970, c.36.

estates fall within section 1 or section 3 of the Statute.[3] That latter section provides:

> III. And moreover That no Leases, Estates or Interests either of Freehold, or Terms of years, or any uncertain Interest, not being Copyhold or Customary Interest, of, in, to or out of any Messuages, Manors, Lands Tenements or Hereditaments, shall at any time after the said four and twentieth day of June be assigned, granted or surrendered unless it be by Deed or Note in Writing, signed by the party so assigning, granting or surrendering the same or their Agents thereunto lawfully authorized by writing, or by act and operation of Law.

The foregoing section requires that assignment and surrender of leases or other interests in land must be in writing, either by deed or note. The reference in section 3 to 'grant' has been interpreted to include conveyances of existing estates (e.g., fee simple).[4] On the other hand, section 1 makes specific reference to conveyances by 'livery of seisin', a method of conveyance originating in the 13th century and available in 1677 for conveying fee simple estates but which under the Statute must be evidenced in writing. Pragmatically, it does not appear significant whether a conveyance falls within section 1 as opposed to section 3 of the Statute. Admittedly, section 3 does not state the legal effect of non-compliance as does section 1. However, the distinction does not appear to have generated litigation.

In regard to leasehold estates, a cursory reading of section 1 might lead one to conclude that the signature of both parties is required and yet case law holds otherwise. In an Ontario case, it was held that only the signature of the lessor is required.[5] In a Newfoundland decision, the District Court held that the signature of the defendant lessee was sufficient to satisfy the Statute's requirement.[6] That judgment may be criticized for failing to distinguish between the writing requirement imposed by section 4 of the Statute with respect to agreements for lease, in which it is only necessary that the defendant (the person to be charged) have signed the memorandum, and the requirement imposed under section 1 of the Statute which demands the grantor's (lessor's) signature. By contrast, the distinction was recognized and applied in *Hotel St. John's Limited* v. *Parsons*.[7] Of course, the writing requirement may be avoided if the lease falls within the exemption accorded leases of short term duration as prescribed by section 2 of the Statute:

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3 See Alberta Institute of Law Research and Reform, Background Paper No.12, Report On *The Statute of Frauds* (1979), at p. 63 and *Butt* v. *Humber* (1976), 17 Nfld. & P.E.I.R. 92 (Nfld. S.C.T.D.) at p. 103 *et seq.*

4 *Ibid.*, Alberta Background Paper.

5 See *Kingston Motor Car Co. Ltd.*, v. *Wright*, [1941] O.W.N. 221 (H.C.).

6 See *Irving Oil Ltd.* v. *Bishop*, [1984] 46 Nfld. & P.E.I.R. 283 (Nfld. D.C.).

7 (1978) 19 Nfld. & P.E.I.R. 386 (Nfld. Dist. Ct.). An oral agreement for lease may be enforceable provided the doctrine of part performance is applicable: see *Foran* v. *Stafford* (1878) 6 Nfld.L.R. 156, and *Fina Estate et al* v. *Mak* (1978) 21 Nfld. & P.E.I.R. 144 (Nfld. Dist. Ct.)

> II. Except nevertheless all Leases not exceeding the term of three years from the making thereof whereupon the Rent reserved to the Landlord, during such term, shall amount unto two third parts at the least of the full improved value of the thing demised.

The conveyancing writing requirement imposed by the *Statute of Frauds*, or its modern equivalents, has not been litigated frequently. The practical requirement of a writing for purposes of registration of title seems to have overtaken any concern with the legal effect of the Statute. Even if oral conveyances of land are deemed valid, recorded evidence is necessary to establish marketable title. The writing requirement, however, becomes problematic in the case of valid oral leases and third parties who subsequently obtain an interest in the land from the lessor.

3. Convenancing in Newfoundland - An Overview

In 1834, the Newfoundland legislature enacted the *Chattels Real Act* consisting of two sections. Subsequent amendments to that Act have not altered its original purpose. The effect of this statute on conveyancing and real property law practice remains questionable. The uncertainty hinges on the intended effect of section 1 of the Act (now section 2):

> All lands, tenements and other hereditaments in Newfoundland and its dependencies which by the common law are regarded as real estate, shall, in all courts of justice in this colony, be held to be 'chattels real,' and shall go to the executor or administrator of any person or persons dying seised or possessed thereof as other personal estate now passes to the personal representatives, any law, custom or usage to the contrary notwithstanding.

The enigmatic term 'chattels real' encompasses the historical development of the leasehold estate. Originally, leases were regarded as personal contracts and did not create or transfer rights *in rem* in land. Consequently, they fell outside the law of real property. In time, leases were accepted as interests in land but retained their status as personalty. R. Gushue, discussing the legislation in the *Canadian Bar Review*[8] in 1926, concluded that "...by statute, there is now no real property in [Newfoundland]."[9] In other words, all lands in Newfoundland are held as chattels real; that is, as leasehold estates. Gushue's interpretation of the effect of the *Chattels Real Act* appears to have gone unchallenged. On the other hand, the assimilation of lands with chattels reals has been applied in the context of execution against land. Though lands are not exigible at common law, chattels real are subject to seizure and sale by writ of *fieri facias* (execution order). It is on this statutory basis that creditors in the Province premise their right to execute against a

8 R. Gushue, *The Law of Real Property In Newfoundland* (1926), 4 Can. Bar Rev. 310.
9 *Ibid.*

debtor's lands. Nevertheless, it must be asked whether the *Chattels Real Act* was intended, *inter alia*, to make land exigible in Newfoundland.

The Newfoundland Law Reform Commission in its *Report on Section 9 of The Registration of Deeds Act*[10] concluded that: "The uncertain effect of the *Chattels Real Act* is clearly unsatisfactory."[11] In a note, the Commission acknowledged: "It is certainly arguable that the intended effect of *The Chattels Real Act* was merely to assimilate moveables to immoveables for the purpose of descent on death, as was done in England by the *Land Transfer Act*, 1897, 60 & 61 Vict., c.65 and in other Canadian provinces by their *Devolution of Estates* legislation."[12] Support for that argument is found in the preamble of the *Chattels Real Act*.[13]

> "Whereas the law of primogeniture, as it affects real estate, is inapplicable to the condition and circumstances of the people in this Island; and whereas the partibility of small estates, by descent, coparceny, or otherwise, would tend to diminish the value thereof, and would, in its application, be attended with much expense and inconvenience...".

Without compelling evidence to the contrary, it is difficult to accept the notion that the *Chattels Real Act* was intended to have the profound effect on property law that Gushue so confidently asserted. At best, it could be argued that while the *Chattels Real Act* had the effect of declaring that freehold interests should be treated as though leasehold, for specified purposes, it did not alter the manner in which freehold interests in land were to be conveyed nor displace the need to indicate the estate being conveyed.

The writing requirement prescribed by the *Statute of Frauds* does not intrude upon the common law requirements for effecting a conveyance of freehold estates in land. This is of singular importance in the conveyance of estates in fee simple. The requirements for an effective conveyance of land are outlined in the leading Newfoundland decision of *Morgan* v. *Hull*.[14] The defendant had purchased land from a third party who had received it as a gift from the elderly plaintiff. The conveyance by gift was evidenced by a one page document prepared by a Justice of the Peace and signed by the plaintiff, but not under seal. The plaintiff brought an action in trespass and a claim for possession. Winter J. dismissed the action and held the defendant had obtained good title from the third party who had obtained it by way of gift from the plaintiff. Seventeen years later, the principle of *Morgan* v. *Hull* was restated by counsel for the plaintiff, but as a judge of the Newfoundland

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10 Newfoundland Law Reform Commission, Report on Section 9 of *The Registration of Deeds Act*, (1990).
11 *Ibid.*, at p. 6.
12 *Ibid.*, at p. 21.
13 See A.C. McEwen, Newfoundland Law of Real Property - The Origin And Development of Land Ownership (1978), doctoral thesis, University of London, at p. 111.
14 *Morgan* v. *Hull* (1961), 45 M.P.R. 194 (Nfld.).

Supreme Court. In *Butt* v. *Humber*[15] Mr. Justice Goodridge, as he then became, stated:[16]

> ...where an instrument duly signed by the grantor, purporting to convey a present interest in land to the grantee, delivered to the grantee, accompanied by the delivery of possession (vacant or otherwise) to the grantee if he is not then already in possession, the interest which is purported to be thereby conveyed, (or the present interest of the grantor therein if that is less than what he purports to convey) passes thereby to the grantee notwithstanding that the instrument is not sealed and was not executed for good or valuable consideration.

Morgan v. *Hull* is open to only one criticism. The Court did not address the issue whether the written conveyance was sufficient to vest the grantee with an estate in fee simple. Presumably, the Court was relying on the presumed legal effect of the *Chattels Real Act*. However, the question cannot be answered solely by reference to that Act. Such an approach ignores the relevance of section 19 of the *Conveyancing Act*,[17] which provides:

> 19.(1) Every conveyance shall, by virtue of this Act, be effectual to pass all the estate, right, title, interest, claim and demand which the conveying parties respectively have in, to or on the property conveyed or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same.
>
> (2) This section applies only if and as far as a contrary intention is not expressed in the conveyance and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

The immediate question is whether section 19 is sufficient to convey freehold title to a grantee. The history of the common law must guide any response. The facts of *Morgan* facilitate that task. There the signed instrument merely stated that: "I give to [Mrs. M.] that parcel of my property situated on Roberts Road in Upper Gullies" [a metes and bonds description was also provided]. The immediate question is whether the word 'give' is sufficient to convey the fee simple estate. At common law, the word 'give' or for that matter, the phrase presently used in formal conveyancing documents in the Province, "Vendors as beneficial owners hereby sell, assign and convey unto the Purchasers..." is not sufficient to convey the fee simple. In the absence of a statutory provision stating otherwise, a conveyance must include words of limitation: "and his heirs". In many jurisdictions, statutory law permits use of the phrase 'fee simple'. The failure to include words of limitation results in the grantee obtaining a life estate (there are exceptions). In England, the problem has been avoided by section 60 of the *Law of Property Act*:[18]

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15 (1976), 17 Nfld. & P.E.I.R. 92 (Nfld. S.C.T.D.).
16 *Ibid.*, at pp. 105-6.
17 R.S.N. 1970, c.63.
18 (1925) 15 & 16 Geo.5, c.20.

> 60.(1) A conveyance of freehold land to any person without words of limitation, or any equivalent expression, shall pass to the grantee the fee simple or other the whole interest which the grantor had power to convey in such land, unless a contrary intention appears in the conveyance.

What is apparent is that the Newfoundland legislature replicated some, but not all of the pertinent English provisions relating to conveyancing. For example, section 19 of the *Conveyancing Act* replicates section 63 of the English *Law of Property Act*. Indeed, what is striking is the similarity between the forms and content of English and Newfoundland conveyances. Nonetheless, the failure of the Province's legislature to enact section 60 of the *English Act* represents a significant void in conveyancing law in the Province. In effect, section 19 of the *Conveyancing Act* merely states that whatever interest the grantor has in the lands is transferred to the grantee. It does not purport, nor is it effective, to vest the fee simple in each successive owner and hence dispense with the required words of limitation. That is the intended effect of section 60 of the *English Act*

Some might argue that the *Chattels Real Act* eliminates the need to replicate section 60 of the English Act. In response, it is to be noted that the *Chattels Real Act* does not specify any term for the leasehold estates it is said to create. It is trite law that a lease of uncertain duration is void. It is therefore recommended, that the legislature enact a provision comparable to section 60 of the English *Law of Property Act*. In the interim period, it is reasonable to assume that no court will impugn conveyancing practice, past or present, in light of the foregoing argument. It would not take a great deal of legal ingenuity to develop and apply a solution which maintains the integrity of conveyancing in the eyes of the public; e.g. presumed feoffment with livery of seisin.

There is one further aspect of the writing requirement which must be addressed and which has preoccupied other law reform commissions. Should instruments of conveyance be by deed; that is, under seal? In many jurisdictions, all conveyances must be by deed, otherwise they are deemed void. Yet under section 3 of the Statute, the writing requirement can be met either by a deed or note. As well, the requirement of a seal to constitute a deed should not be confused with the notion of a seal rendering enforceable a gratuitous promise. In light of *Morgan* v. *Hull*, the law of Newfoundland differs from its counterparts and, in the opinion of the author, should remain so. Accordingly, it is recommended that the deed (seal) requirement not be imposed. The reasoning of Mr. Justice Winter in *Morgan* v. *Hull* is compelling:[19]

> The first question arises because it is a gift of land, which under English law can be made only by deed. That is provided by the *Real Property*

19 *Supra*, note 8, at pp. 196-7.

Acts of 1847 and 1925. Now, while the Newfoundland *Conveyancing Act* and other statutes frequently mention deeds, nowhere, as Mr. Lewis pointed out, is there any positive enactment that at least between private parties a conveyance of land can only be made by a document in writing to which a seal is affixed. (There was no seal in this instance.) I do not think this can be due to mere oversight; for while it is true that the very great majority of documents and instruments which by English law would require sealing are in fact in this Province made under seal it may be doubted whether much would be gained by making that a rigid requirement without which the instrument would be invalid. I think this has been appreciated by our legislatures and those entrusted with the duty of drafting statutes. More harm than good would in my opinion be done by such an enactment. I think that virtually all men in this Province including even the illiterate realize the necessity for some sort of document in writing when land is transferred; but very few of them appreciate or can be expected to appreciate, the meaning and importance of a seal which after all where it is not part of the signature as in the case of companies may fairly be called an empty formality.

4. Oral Conveyances

It would be misleading to assert that abrogation of the writing requirement would validate oral conveyances of land.[20] The Statute is concerned only with the form, and not the content or substantive effect, of instruments of conveyance. As discussed above, section 19 of the *Conveyancing Act*[21] contemplates a written document to transfer title to land. However, a writing is not mandated by that Act and accordingly, the source of that requirement lies in the *Statute of Frauds*. If that Statute is repealed, then land could be conveyed pursuant to the *Conveyancing Act* or alternatively, in a manner recognized at law prior to the passage of the Statute. Were so-called oral conveyances recognized prior to 1677?

Any history of property law reveals that conveyancers developed several ways to effect conveyances of land by written instrument. The bargain and sale deed, the lease and release, coupled with the *Statute of Uses* and/or *Statute of Enrolments* avoided the alternative method of conveyance, feoffment with livery of seisin. It was a solemn ceremony wherein the parties entered on the land and in the presence of witnesses delivered seisin to the feoffee (grantee) by a symbolic act such as handing over some earth. Though no writing was required because of the publicity surrounding the transaction, it was customary for the grantor to provide the grantee with a charter of feoffment - a written record. In *Butt* v. *Humber*,[22] it was held that an interest in land may be transferred *inter alia*; "By: feoffment, or livery of seisin".[23]

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20 Separate treatment must be accorded oral leases which under the Statute are exempt from the writing requirement.

21 As noted earlier, to be timely effective, the *Conveyancing Act* should also replicate section 60 of the English *Law of Property Act*.

22 *Supra*, note 13.

In the judgment, the Court acknowledges that section 1 of the Statute imposes a writing requirement.[24] It is worth noting that section 1 also states that an estate created by "livery of seisin or parol must be in writing". Ultimately, it must be accepted in historical terms that an oral conveyance, if permissible, must be effected by feoffment with livery of seisin.

Discussion of the possible means by which land may be transferred by oral conveyance, lacks relevance unless it is in the context of an *inter vivos* gift of land. *Morgan* v. *Hull* applies only to gifts evidenced in writing. The remaining option is feoffment with livery of seisin, assuming that the Statute's writing requirement is repealed. However, it is simply not realistic to contemplate a gift of land in which the parties engage in the ceremony of livery of seisin. The truth of the matter is that repeal of the writing requirement would not validate oral gifts of freehold estates in land. At the same time, the law does offer some protection to those who are promised land, but fail to receive the required document of title. In the leading English case of *Dillwyn* v. *Llewelyn*,[25] a father promised to give his son a parcel of land. The son, acting on the gratuitous promise, built a home on the land with the knowledge of the father. The father died without executing a conveyance of the lands and his estate resisted the son's claim for specific performance on the ground of lack of consideration. The son was successful, not on the ground of an enforceable contract, but on the basis of proprietary estoppel. Cases such as *Dillwyn* lessen the potential hardship resulting from a failure to perfect a gift of lands.

The notion of asserting the validity of an oral conveyance in the context of an executory bi-lateral contract for the sale of land is less convincing than in the case of gifts. If the sale is pursuant to an enforceable written agreement, specific performance may be sought and granted in accordance with the law, assuming that the land has not been sold to a *bona fide* purchaser for value and without notice of the prior agreement. If the contract of sale is oral, then it remains to be determined whether it is enforceable. If section 4 of the Statute is repealed and no replacement legislation is enacted, then specific performance of the oral contract is available. If the writing requirement is retained in one form or another, then the purchaser will argue part performance or reliance. If the Ontario solution is adopted, presumably it will not be difficult to corroborate the existence of the contract by adducing material evidence. In summary, a purchaser who feels compelled to allege title by oral conveyance, has failed to grasp the distinction between a contract to convey and the actual conveyance.

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23 *Ibid.*, at p. 98.

24 *Ibid.*, at pp. 103-4.

25 (1862), 4 De.G.F. & J. 517, 45 E.R. 1285. See also cases collected in S.M. Waddams, The Law of Contracts (Toronto: Canada Law Book, 2nd. ed., 1984) at p. 139, note 45. In *Wells* v. *Wells* (1945) 15 Nfld.L.R. 308, the equitable doctrine was not applied as there was no promise on the part of the father to make a gift of the lands to his son.

It is not surprising that Manitoba[26] repealed their equivalents of sections 1 to 3 of the Statute with apparently no negative repercussions.[27] Indeed, the Law Reform Commission of British Columbia[28] adopted the view that the possibility of an oral conveyance of an interest in land was so remote that no recommendation was required. Nonetheless, it is understandable why others have retained the writing requirement. Why repeal a requirement which has not proven to be problematic and which is consistent with conveyancing practice? For those who remain wedded to the writing requirement, a compromise solution is to mandate that: "a conveyance of an estate or interest in land shall be in writing". No penalty for non-compliance need be prescribed. A liberalized writing requirement of this type would at least discourage a frivolous allegation of oral conveyance, while being consistent with the objectives of a registry system for recording title to land and determining marketability. It is recommended that sections 1 and 2 of the Statute (other than in the context of leases, assignments and surrenders thereof) be repealed. While the author recommends against replacement legislation, enactment of a writing requirement which is flexible and responsive to the realities of modern conveyancing is not objectionable. It is not to be assumed, however, that retention of the writing requirement is premised on the need to invalidate oral conveyances. The requirement of feoffment by livery of seisin would, if necessary, achieve that result. Finally, the above recommendation is not to be regarded as encroaching on those provisions of the *Condominium Act*[29] which deal with conveyancing requirements.

5. Leases

It is clear that section 6 of the *Residential Tenancies Act*[30] supersedes the provisions of the *Statute of Frauds*. That provision requires that a landlord provide each tenant with a copy of the executed lease. However, non-compliance does not invalidate oral leases. Hence, the following analysis is directed toward commercial leasing arrangements.

Retention or abrogation of the writing requirement in the context of leasehold conveyances, coupled with the option of retaining a writing exemption for short term leases, are matters which, at first sight, appear suited to both reform discussion and recommendations. However, such objectives are beyond the scope of any discussion paper focusing on the *Statute of Frauds*. While the principal reason is outlined below, a reluctance

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26 *An Act to Repeal The Statute of Frauds*, S.M. 1982-83-84, c.34.
27 That conclusion is based on a personal communication with the Director of the Manitoba Law Reform Commission, June 1988.
28 Law Reform Commission of British Columbia, Report No. 33, *Report on the Statute of Frauds* (1977) at p. 59.
29 R.S.N. 1970, c.57.
30 S.N. 1988, c.44, s.6.

to make specific recommendations does not preclude discussion of the wide-ranging issues to be addressed in future.

Any recommendation with respect to the writing requirement for leasehold estates must take into account the reform solution chosen in regard to contracts to convey and, particularly, agreements for lease, which are presently governed by section 4 of the Statute. A failure to appreciate the interdependency of the two reform recommendations could lead to paradoxical results. Assume that the writing requirement in regard to agreement for leases is retained, while short term leases are to remain exempt from that requirement. The result is that a party to an action will be required to prove that an agreement for lease is in writing but able to enforce a short-term oral lease. That is precisely the state of the law under the *Statute of Frauds*. Alternatively, assume that the writing requirement for agreements to lease is abrogated while being retained in regard to leases of long term duration (e.g., three years or more). Reform of that kind would mean that an oral agreement for lease for a ten year term would be enforceable without writing, but a lease for the same period would not. In such circumstances it is inadvisable to offer a specific recommendation on the leasehold writing requirement. Attention must, therefore, focus on existing deficiencies.

Section 2 of the *Statute of Frauds* exempts leases from the writing requirement if they do not exceed a term of "three years from the making thereof" and "the rent reserved shall amount into two-third parts at least of the full improved value of the thing demised". Under the first requirement the exemption is not necessarily applicable even though the fixed term of the lease is three years or less. It has been judicially determined that the words "three years from the making thereof" refer to the date of making the agreement, rather than the date of commencement of the lease. Thus, a lease for a term of three years but executed a week prior to the commencement date must be in writing.[31] If the writing requirement does serve a valid purpose, the present method of calculating time prescribed by the Statute is counter-productive and should be revised by simple reference to the lease term should the exemption be retained.

One of the more obscure aspects of section 2, stems from the requirement that the rent be at least two-thirds of the full improved value of the property. This stipulation has been interpreted to mean an annual rent of two-thirds the fair market value of the land, two-thirds the annual value or the yearly profit value of the land and finally a rent of two-thirds of the annual rental value.[32] In this regard, section 2 is obscure, unwieldly and arcane. This

31 *Forster* v. *Reeves [1892]2* Q.B. 255 (C.A.).

32 In *Body* v. *Quartermain* (1853), 12 Ga. 386, it was held that the rent must equal at least two-thirds of the fair market value of the land. In *Hoj Industries* v. *Dundas Sheppard Square Ltd.* (1978) 23 O.R. (2d) 295 it was held that the phrase meant full rental value of the leased property and not the sale value of the leased property. See generally Institute of Law Research and Reform of Alberta,

requirement should be abrogated. Its original purpose was to prevent secret leasehold conveyances granted for the purpose of defeating creditors. The law has developed sufficiently to prohibit such conveyances.

Till now, discussion has been limited to the enforceability of leases *vis a vis* the immediate parties to the conveyance. The greatest difficulty facing reform lies in the enforcement of leases as between lessees and third parties who acquire by contract or law rights in the leasehold property. The priority issue is of concern, for example, where a tenant is in possession under a valid oral lease under the *Statute of Frauds* and the property (the reversion in fee simple) is sold to a third party who now claims vacant possession. Alternatively, a three-year lease may have been reduced to writing but not registered. A statutory solution to this problem, but one not prescribed by the *Registration of Deeds Act*, exists in Provinces which maintain a registry system of title recordation. Leases which are exempt from the writing requirement need not be registered pursuant to the relevant legislation provided that the tenant takes possession of the premises as soon as practical. That is, such leases are exempt from the effects of non-registration. In such jurisdictions, a purchaser of the lessor takes subject to oral (or written) leases provided the lease term is three years or less. This is true whether or not the purchaser has notice of the earlier lease. In commercial situations, the problem is more acute if the lease is in writing and for a period exceeding three years and not registered. In these circumstances, the onus shifts to the lessee to prove that the purchaser took with notice of the unregistered written lease. If the purchaser had no notice of the unregistered lease, the lessee loses the right to possession. One issue which has yet to be resolved satisfactorily at common law, focuses on the sufficiency of notice to preclude a purchaser from obtaining priority over unregistered instruments. Is notice of a tenant in possession sufficient, or must it be notice that a written lease exists? Alternatively, must it be notice that the lease term exceeds three years? The case law is ambiguous. The appropriate response rests on the solution of a broader policy issue. To what extent is the law prepared to uphold the validity of an instrument as against a third party when that instrument was not registered as required by law, thereby undermining the objectives of a land registry system; that is, an efficient means for determining title and hence priority?

The writing and registration issue is complicated by the *Registration of Deeds Act*. While section 9 of that Act requires registration to maintain priority, no exemption is accorded oral leases which comply with the requirements set out in section 2 of the *Statute of Frauds*. Rather, section 6 of the *Registration of Deeds Act* exempts "leases at a rack rent" and those granted by the St. John's Housing Corporatin (now Newfoundland and

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Background Paper No.12, *Report On The Statute of Frauds* (1979), at pp. 69-70.

Labrador Housing Corporation). Of the two exemptions, only the former would appear to be relevant to commercial leasing arrangements. Rack rent is a rent of the full annual value of the leased lands or premises and is to be determined at the time of the letting.[33] As one commentator has adroitly observed:[34]

> The use of the term "rack rent" unfortunately introduces uncertainty into the registration system, since it will be a question of fact in each case as to whether the property was leased at the best rent available and hence not subject to registration.

If a lease is exempt from the registration requirement, then of course, the purchaser takes subject to the lease whether or not the purchaser takes with actual notice of the tenant in possession. But it is to be presumed that the purchaser without actual notice will be bound by an oral lease even where the term of the lease is for a period of ten years. Though under the *Statute of Frauds* that lease is void as between lessor and lessee, it is well accepted in law that a tenant who takes possession under such a void lease and pays rent becomes a tenant of the landlord from year to year.[35] Presumably, the purchaser would be treated in the same manner as the original lessor, notwithstanding the fact that the oral lease meets the "rack rent" requirement and thus outside the ambit of the *Registration of Deeds Act*. In other words, the exemption provided by section 6 of that Act does not validate oral leases with a term greater than three years.

Practitioners will readily separate the academic from the practical concerns. On a sale of property occupied by one or more tenants, an obligation rests with the purchaser's solicitor to make appropriate inquiries which, in part, will depend on the extent to which the sale contract makes provision for vacant possession, adjustment of rent, etc. Ultimately it must be recognized that conveyancing practice and custom cannot be ignored in the pursuit of the appropriate reform recommendation. Consultation with the practising bar is recommended.

A review of other law reform papers pertaining to the enforceability of oral leases reveals a potential folly for those who might attempt to apply case law divorced from the statutory framework in which a particular case was decided. Much of the case law is decided on the basis of statutory enactments unique to the particular jurisdiction and which deviate significantly from sections of the 1677 Statute. To complicate matters further, it is not uncommon to find that the legislation under judicial scrutiny was

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33 See, 1 Woodfall's *Law of Landlord and Tenant* (28th ed., by V. Welling. ed. 1298) p. 280, para 1-0692.

34 J. D. Green, "Registration, Notice and Defeasance under The Registration of Deeds Act" (1983) *Newfoundland Continuing Legal Education--Practical Property* at p. 20 *et seq.*

35 C.f. *Gleeson* v. *Quirk* (1854) 4 Nfld.L.R. 25.

subsequently amended. Accordingly, the applicability of cases decided elsewhere must be scrutinized carefully.

CHAPTER 4

TRUSTS OF LAND - SECTIONS 7-9

VII. And be it further enacted by the Authority aforesaid, That from and after the said four and twentieth day of June all Declarations or creations of trust or confidences of any lands, tenements or Hereditaments, shall be manifested and proved by some Writing signed by the Party who is by Law enabled to declare such Trust, or by his last Will in Writing or else they shall be utterly void and of none Effect.
VIII. Provided always, That where any Conveyance shall be made of any Lands or Tenements by which a Trust or Confidence shall or may arise or result by the Implication or Construction of Law, or be transferred or extinguished by an Act or operation of law, then and in every such Case such Trust or Confidence shall be of the like Force and Effect as the same would have been in this Statute had not been made; any thing herein before contained to the contrary notwithstanding.
IX. And be it further enacted, That all Grants and Assignments of Any Trust or Confidence shall likewise be in Writing, signed by the Party granting or assigning the same, or by such last Will or Devise, or else shall likewise be utterly void and of none Effect.

Section 7 of the *Statute of Frauds* renders void (this has been interpreted to mean unenforceable)[1] any declaration or creation of trusts of interests in land, unless evidenced in writing and signed by the person creating the trust. Section 8 exempts trusts which arise by implication or construction of law; that is, resulting and constructive trusts. Finally, section 9 provides that all grants and assignments of express trusts must be in writing and signed by the party effecting the grant or assignment.

The trust provisions have not been repealed implicitly by superseding legislation. A review of provincial law reform reports reveals a sustained controversy over whether section 7 has been judiciously repealed by application of section 8, which exempts trusts created by law as opposed to agreement. The British Columbia Law Reform Commission[2] recommended repeal of all three sections, while the Manitoba Law Reform Commission[3] recommended retention. The Manitoba legislature disagreed with its Commission and in 1983 repealed the Statute *in toto*.[4] From a practical perspective, it is interesting to note that there are no commonwealth reported cases on section 9 of the Statute. There are no reported cases in Newfoundland involving either section 7, 8 or 9.

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1 See *Rochefoucauld* v. *Boustead*, [1897] 1 Ch 196 (C.A.).
2 Law Reform Commission of British Columbia, Paper No.33, *Report on the Statute of Frauds* (1977) at p. 30.
3 Law Reform Commission of Manitoba, Report No.41, *Report on the Statute of Frauds* (1980).
4 An Act to Repeal The Statute of Frauds, S.M. 1982-83-84, c.34.

It might be asked whether there are any compelling reasons to retain the trust provisions of the Statute. In regard to sections 7 and 8, Professor Donovan Waters believes otherwise.[5]

> In the author's view the answer is for the provinces and territories to repeal those provisions of the Statute that call for written evidence of oral trusts of land or interests in land, together with those provisions that exempt trusts arising by operation of law. This would terminate both sections 7 and 8 or their equivalent in provincial legislation. The object of the Statute is 1677 was to protect the courts from having to sift the truth from constantly perjured evidence. During the nineteenth century it is clear that the courts continued to weigh oral evidence, and when they were satisfied that a trust had been created, the Statute became a mere hindrance to its enforcement. There seems no reason today why this hindrance should not simply be removed.

In regard to the proper fate of section 9 of the Statute, Professor Waters concludes:[6]

> With regard to the assignment, surrender or extinction of equitable interests under trusts of realty or personalty, the British Columbia Commission, as we have seen, would repeal it, Manitoba's Commission would retain it, and the Alberta Institute's paper wonders whether written notice to the *trustees* of an assignment is not all that is needed. Again, the same arguments apply as with sections 7 and 8; uniformity seems the primary goal that we should be seeking to achieve. There are no public policy issues at stake to divide the various Canadian common law jurisdictions.

It is recommended that sections 7, 8 and 9 of the Statute be repealed and that no replacement legislation be enacted.

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5 D. Waters, Law of Trusts in Canada (Toronto: Carswell, 2nd ed., 1984) at p. 213.
6 *Ibid.*, at p. 215.

CHAPTER 5

WILLS AND PROBATE - SECTIONS 5, 6, AND 19-25

1. Introduction

This chapter examines sections 5, 6, and 19-25 inclusive of the *Statute of Frauds*,[1] which embrace the making, revocation and proving of wills. As discussed below, these sections have been repealed implicitly by provisions found in either; the *Wills Act*;[2] the *Wills (Volunteers) Act*;[3] the *Judicature Act*;[4] *An Act for the Better Administration of Justice in Newfoundland and for Other Purposes*,[5] or the *Intestate Succession Act*.[6] To facilitate the analysis, each section of the Statute will be reproduced and followed immediately by the relevant provision of the superseding legislation. Should a substantive difference exist between a provision of the Statute and a repealing section, the difference will be noted.

2. Section 5 - Devises Of Land To Be In Writing

> V. And be it further enacted by the Authority aforesaid, That from and after the said four and twentieth Day of June all Devises and Bequests of any Lands or Tenements, devisable either by Force of the Statute of Wills, or by this Statute, or by Force of the Custom of Kent, or the Custom of any Borough, or any other particular Custom, shall be in Writing, and signed by the Party so devising the same, or by some other Person in his Presence and by his express Directions, and shall be attested and subscribed in the Presence of the said Devisor by three or four credible Witnesses, or else they shall be utterly void and of none Effect.

Section 2 of the *Wills Act* provides:

> No will shall be valid unless it be made in writing, nor unless it be either in the handwriting of the testator, and signed by him, or, if not so written and signed, be signed by him in the presence of at least two witnesses, who shall, in the presence of the testator, sign the same as witnesses, and in case such will shall be made by a marksman, unless the same shall have been first read over to or by the testator in the presence of the said witnesses: Provided that any seaman or fisherman, being at sea, may dispose of his property in the same manner as he might have done before the passing of this Act.

Section 2 of the *Wills Act* effectively repeals section 5 of the *Statute of Frauds*. The major distinction between the two sections is that the former

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1 29 Car. II, c.3 (hereafter the Statute).
2 R.S.N. 1970, c.401.
3 R.S.N. 1970, c.402.
4 S.N. 1986, c.42.
5 5 Geo. IV, c.67.
6 R.S.N. 1970, c.183.

requires only two witnesses, while the latter requires a minimum of three. Repeal of section 5 of the Statute would have no substantive effect on Newfoundland law and is therefore recommended.

3. Section 6 - Revocation of Wills Dealing With Land

> VI. And moreover, No Devise in Writing of Lands, Tenements or Hereditaments, nor any clause thereof, shall at any Time after the said four and twentieth Day of June be revocable, otherwise than by some other Will or codicil in Writing, or other Writing declaring the same, or by burning, cancelling, tearing or obliterating the same by the Testator himself, or in his Presence and by his Directions and Consent; but all Devises and Bequests of Lands and Tenements shall remain and continue in force, until the same be burnt, cancelled, torn or obliterated by the Testator, or his Directions, in Manner aforesaid, or unless the same be altered by some other Will or Codicil in Writing, or other Writing of the Devisor signed in the Presence of three or four Witnesses, declaring the same; any former Law or Usage to the contrary notwithstanding.

Section 11 of the *Wills Act*, provides:

> No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, [e.g., revocation by marriage] or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, and with the intention of revoking the same.

While section 11 of the *Wills Act* repeals by implication, section 6 of the *Statute of Frauds*, the former section imposes a more onerous test in regard to revocation of all wills and not just those that devise an interest in lands as envisaged by the *Statute of Frauds*. Pursuant to the *Wills Act*, not only is physical destruction necessary to effect a revocation but so too must the act be done with the intent to revoke: "All the destroying in the world without intention will not revoke a will nor all the intentions in the world without destroying; there must be the two."[7] Of course, the very act of destroying a will raises a presumption of intention to revoke which could be rebutted if evidence showed that destruction was accidental. In any event, the provisions of the *Wills Act* are more comprehensive than section 6 of the *Statute of Frauds*. Accordingly, repeal of section 6 of the Statute will have no substantive effect on Newfoundland Law it and should be repealed expressly.

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7 *Cheese* v. *Lovejoy* (1877), 2 P.D. 251 (C.A.) at 253. There are a number of Newfoundland cases dealing with revocation; see: *Flood* v. *Flood* (1940), 14 Nfld.L.R. 397 and *In Re Thomas Dunn* (1885), 7 Nfld.L.R. 82, revocation by destruction; *Ryan* v. *Ottenheimer* (1937), 14 Nfld.L.R. 111, revocation by subsequent inconsistent codicil to the extent of inconsistency.

4. Section 19 - Nuncupative Wills

> XIX. 'And for Prevention of fraudulent Practices in setting up Nuncupative Wills, which have been the Occasion of much Perjury;' Be it enacted by the Authority aforesaid, That from and after the aforesaid four and twentieth Day of June no Nuncupative Will shall be good, where the Estate thereby bequeathed shall exceed the Value of thirty Pounds, that is not proved by the Oaths of three Witnesses (at the least) that were present at the making thereof; nor unless it be proved that the Testator at the Time of pronouncing the same, did bid the Persons present, or some of them, bear Witness, that such was his Will, or to that Effect; nor unless such Nuncupative Will were made in the Time of the last Sickness of the Deceased, and in the House of his or her Habitation or Dwelling, or where he or she hath been resident for the Space of ten Days or more next before the making of such Will, except where such Person was surprised or taken sick, being from his own Home, and died before he returned to the Place of his or her Dwelling.

As discussed above, section 2 of the *Wills Act*, provides that no will is valid unless it is in writing. A nuncupative will is an oral will declared or dictated by the testator in his "last sickness" before a sufficient number of witnesses, and later reduced to writing. Section 2 of the *Wills Act* repeals implicitly section 19 of the *Statute of Frauds*. Hence, express repeal of section 19 will have no substantive effect on Newfoundland law and is thus recommended.

5. Section 20 - Time Period to Reduce Nuncupative Wills to Writing

> XX. And be it further enacted, That after six Months passed after the speaking of the pretended Testamentary Words, no Testimony shall be received to prove any Will Nuncupative, except the said Testimony, or the Substance thereof, were committed to Writing within six Days after the making of the said Will.

Comments made above in regard to section 19 of the *Statute of Frauds* apply *mutatis mutandis* to section 20.

6. Section 21 - Probate of Nuncupative Wills

> XXI. And be it further enacted, That no Letters Testamentary or Probate of any Nuncupative Will shall pass the Seal of Any Court, till fourteen Days at the least after the Decease of the Testator be fully expired; nor shall any Nuncupative Will be at any Time received to be proved, unless Process have first issued to call in the Widow, or next of Kindred to the Deceased, to the End they may contest the same if they please.

Comments made above in regard to section 19 of the Statute of Frauds apply *mutatis mutandis* to section 21.

7. Section 22 - Alteration of Wills Dealing With Personal Estates

> XXII. And be it further enacted, That no Will in Writing concerning any goods or Chattels, or Personal Estate, shall be repealed, nor shall any Clause, Devise, or Bequest therein, be altered or changed by any Words, or Will by Word of Mouth only, except the same be in the Life of the Testator committed to Writing, and after the Writing thereof read unto the Testator, and allowed by him, and proved to be so done by three witnesses at the least.

Section 12 of the *Wills Act* provides:

> No obliteration, interlineation or other alteration,made in any will after the execution thereof, shall be valid or have any effect except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be made and executed in manner hereinbefore required; but such will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator, or such signature and the subscription of the witnesses, as the case may be, be made in the margin or on some part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will or attached thereto.

While section 6 of the *Statute of Frauds* encompasses revocation by destruction or alteration of a will pertaining to land, section 22 of that Statute is restricted to wills dealing with personalty. As well, section 22 does not deal with revocation by destruction. Section 12 of the *Wills Act* provides that any alteration of a will, whether it deals with real or personal property, is invalid unless signed and witnessed in accordance with section 1 of the *Wills Act*. Section 12 of *The Wills Act* implicitly repeals section 22 of the *Statute of Frauds*.[8] Repeal of section 22 of the Statute of Frauds will have no substantive effect on Newfoundland law and is therefore recommended.

8. Section 23 - Privileged Wills

> XXIII. Provided always, That notwithstanding this Act, any Soldier being in actual military Service, or any Mariner or Seaman being at Sea, may dispose of his Moveables, Wages and Personal Estate, as he or they might have done before the making of this Act.

Section 2 of the *Wills Act* requires that all wills be in writing with one exception: "Provided that any seaman or fisherman, being at sea, may dispose of his property in the same manner as he might have done before the passing of this Act". Section 3 of the *Wills (Volunteers) Act* states that a volunteer may dispose of property by will in any manner in which he might

8 As well, insofar as section 22 of the *Statute of Frauds* deals with revocation ("shall be repealed"), it is implicitly repealed by section 11 of *The Wills Act*; see *supra* section 3 of this Chapter.

lawfully do so according to the law of England. Since this statute was enacted by the Newfoundland legislature after 1837, the law of England was the *Wills Act* of 1837.[9] That Act allowed soldiers in active military service to make a will without conforming to the writing or age requirement. Pursuant to section 2 of the *Wills (Volunteers) Act*, a "volunteer" is defined to mean:

> "... a member of the Newfoundland Regiment or of the Newfoundland Branch of the Royal Naval Reserve, or of the Newfoundland Forestry Companies, or a person, who, being at the outbreak of the war of 1914-1918 a resident of Newfoundland became a member of any of His Majesty's naval, military, medical or nursing services or organizations or served as a chaplain in His Majesty's services.

Aside from the obvious fact that the foregoing definition reflects the realities of Newfoundland prior to Confederation, section 2 of the *Wills Act* and section 3 of the *Wills (Volunteers) Act* effectively repeal section 23 of *The Statute of Frauds*. Accordingly, repeal of section 23 of that Statute will have no substantive effect on Newfoundland law and is therefore recommended. However, that recommendation does not preclude a review of the *Wills Volunteers) Act* with a view to ensuring that it reflects modern conditions.

9. Section 24 - Rights of English Courts to Probate Wills

> XXIV. And it hereby declared, That nothing in this Act shall extend to alter or change the Jurisdiction or Right of Probate of Wills concerning personal Estates, but that the Prerogative court of the Archbishop of *Canterbury*, and other Ecclesiastical Courts, and other Courts having Right to the Probate of such Wills, shall retain the same Right and Power as they had before, in every respect; subject nevertheless to the Rules and Directions of this Act.

Section 108(1) of the *Judicature Act* provides that "every application for letters of probate or administration or for the resealing of a foreign grant, shall be by petition to the Court. Section 106(a) of that Act defines Court as "the trial division [of the Supreme Court of Newfoundland], the Court or a judge or the judges therefore, whether sitting in Court or in chambers." As well, there are other statutory provisions relevant to the matter of probate jurisdiction. The jurisdiction of the Supreme Court of Newfoundland is outlined in section 3(1) of the *Judicature Act*. It provides:

> 3.(1) The Supreme Court of Newfoundland is continued under this Act and shall have all civil and criminal jurisdiction whatsoever conferred upon the Supreme Court of Newfoundland before the commencement of this Act
>
> > (a) by the Imperial statute passed in the fifth year of the reign of His late Majesty King George the Fourth, entitled

9 7 Wil. 4 & 1 Vict., c.26.

"An Act for the better administration of justice in Newfoundland, and for other purposes";

(b) by the Royal Charter or Letters Patent under the Great Seal, issued by virtue of the Imperial Statute, dated September 19th, 1825, in the sixth year of His late Majesty's reign; and

(c) by any law in force in the province.

With respect to *An Act for the Better Administration of Justice in Newfoundland and for Other Purposes*; section 5 is relevant.

V. And be it further enacted, That the said Supreme Court shall have Power to grant Administration of the Effects of Intestates, and the Probate of Wills; and that the Effects of deceased Persons shall not be administered within the Island of *Newfoundland*, or any Island, Place or Territory dependant upon the Government thereof, unless Administration or Probate shall have been duly granted by the said Supreme Court; and in all Cases where the Executor or Executors of any Will in *Newfoundland*, or the Dependencies thereof, upon being duly cited, shall refuse or neglect to take out Probate as aforesaid; or where the next of Kin shall be absent from *Newfoundland*, and the Effects of the Deceased shall appear to the said Supreme Court to be exposed and liable to Waste, it shall be lawful for the said Supreme Court to authorize and empower the Registrar or Clerk of the said Court, or some other fit and proper Person, to collect the said Effects, and hold, or deposit or invest the same in such Manner and Place, or upon such Security, and subject to such Orders and Directions as shall be made by the said Supreme Court in respect of the Custody, Control or Disposal of such Effects.

It is beyond doubt that section 24 of the *Statute of Frauds* has been repealed by superceding legislation. Express repeal will have no substantive effect on Newfoundland law and is therefore recommended.

10. Section 25 - Estates of Feme Coverts (Married Women)

XXV. And for the explaining one Act of this present Parliament, entituled, *An Act for the Better Settling of Intestates Estates*; Be it declared by the Authority aforesaid, That neither the said Act, nor any Thing therein contained, shall be construed to extend to the Estates of Feme Coverts that shall die Intestate, but that their Husbands may demand and have Administration of their Rights, Credits, and other personal Estates, and recover and enjoy the same, as they might have done before the making of the said Act.

Enacted for the purpose of clarifying other legislation, section 25 of the Statute reaffirms the common law right of a husband to be appointed administrator of the estate of his intestate wife. Of course it would be expected that a similar right vest in a woman on the death of her intestate husband. In any event, pursuant to section 117 of the *Judicature Act*, the court is empowered to grant administration or probate to some person other than the one entitled to such at law. Moreover, pursuant to the *Intestate*

Succession Act, the distribution of the estate of a woman (wife) who dies intestate is no different than that of a man (husband). Section 25 of the *Statute of Frauds* is no longer of relevance to determining who is entitled to letters or probate or administration. Express repeal of section 25 of the Statute is recommended.

11. Summary

The repeal of sections 5, 6 and 19 to 25 inclusive of the *Statute of Frauds* would formally recognize the fact that these provisions are no longer applicable as received law in light of superseding legislation. It may be that the law of wills and probate as governed by existing legislation is in need of reform. But that possibility does not detract from the fact that the first step in the reform process is to repeal formally the *Statute of Frauds* as it intrudes upon the law relating to wills and probate.

CHAPTER 6

DEBTOR AND CREDITOR - SECTIONS 10-16 & 18

1. Introduction

It was agreed that the discussion paper should not attempt to offer an exhaustive analysis of the debtor-creditor provisions of the *Statute of Frauds*,[1] nor formulate wide ranging recommendations for reform. That decision was based on the fact that the Newfoundland Law Reform Commission was about to release its *Report on Section 9 of the Registration of Deeds Act*,[2] which canvasses issues relevant to this area of the law. Accordingly, the following analysis is restricted to a brief discussion of the significance of each provision and a recommendation with respect to whether replacement legislation for those provisions which have not been superseded by existing provincial legislation is needed.

2. Section 10 - Binding Effect of Judgment on Lands Held in Trust

> X. And be it further enacted by the Authority aforesaid, That from and after the said four and twentieth Day of June it shall and may be lawful for every Sheriff or other Officer to whom any Writ or Precept is or shall be directed, at the Suit of any Person or Persons, of, for and upon any Judgment, Statute or Recognizance hereafter to be made or had, to do, make and deliver Execution unto the Party in that Behalf suing, of all such Lands, Tenements, Rectories, Tithes, Rents and Hereditaments, as any other Person or Persons be in any Manner of wise seised or possessed, or hereafter shall be seised or possessed, in trust for him against whom Execution is so sued, like as the Sheriff or other Officer might or ought to have done, if the said Party against whom Execution hereafter shall be so sued, had been seised of such Lands, Tenements, Rectories, Tithes, Rents or other Hereditaments of such Estate as they be seised of in trust for him at the Time of the said Execution sued; which Lands, Tenement,Rectories, Tithes, Rents and other Hereditaments, by force and virtue of such Execution, shall accordingly be held and enjoyed freed and discharged from all Incumbrances of such Person or Persons as shall be so seised or possessed in trust for the person against whom such Execution shall be sued; and if any *Cestui que Trust* hereafter shall die, leaving a Trust in Fee-simple to descend to his Heir, there and in every such Case such Trust shall be deemed and taken, and is hereby declared to be, Assets Descent, and the Heir shall be liable to and chargeable with the Obligation of his Ancestors for and by reason of such Assets, as fully and amply as he might or ought to have been, if the Estate in Law had descended to him in Possession in like Manner as

1 (1677) 29 Car.2, c.3.
2 Newfoundland Law Reform Commission, *Report on Section 9 of the Registration of Deeds Act*, (NLRC-R4; October 1990).

the Trust descended; any Law, Custom or Usage to the contrary in any wise not withstanding.

There are two aspects to section 10. The first is directed at the rights and remedies of judgment creditors over lands in which the judgment debtor is the beneficial owner pursuant to a trust arrangement. In light of the recommendations made by the Commission in its *Report*, directed at amending those provisions of the *Judicature Act*[3] relating to execution against land, it is recommended that this provision be repealed and without enacting replacement legislation. This recommendation assumes that all interests in land are either presently exigible, or will be made so, under the existing execution order provided for under Rule 51.02(1) of the Rules of Court. Even if it were determined that land in the Province is not presently exigible, the repeal of section 10 would not prejudice judgment creditors, nor would there be a need for replacement legislation. The available common law writs are ineffective for effecting a sale of the debtor's lands which explains why reform is required.

The second aspect of section 10 deals with situations in which a *cestui que trust* bequeaths lands in trust in fee simple. Such a trust saddles the property in the hands of the heir with the obligations of the *cestui que trust*. While it appears that a person, who inherits in such circumstances, may become personally liable for the debts of the testator, section 11 of the Statute negates such an intention. Repeal of this portion of section 10 is recommended. The right of judgment creditors to proceed against the estate of their judgment debtors generally, is a matter which should be covered by specific legislation. As well, the analysis provided of section 11 reinforces this concern.

3. Section 11 - Execution Against Deceased Debtor's Assets

> XI. Provided always, That no Heir that shall become chargeable by reason of any Estate or Trust made Assets in his hands by this Law, shall by reason of any Kind of Plea or Confession of the Action, or suffering Judgment by *Nient dedire*, or any other matter, be chargeable to pay the Condemnation out of his own Estate; but Execution shall be sued of the whole Estate so made Assets in his Hands by Descent, in whose Hands soever it shall come after the Writ purchased, in the same Manner as it is to be at and by the common Law, where the Heir at Law pleading a true Plea, Judgment is prayed against him thereupon; any Thing in this present Act contained to the contrary notwithstanding.

Section 11 negates personal liability of an heir with respect to a judgment subsequently obtained against the estate of the deceased. Execution by the judgment creditor is limited to those assets which have devolved to the heir. Repeal of section 11 is recommended. Section 128 of the *Judicature Act*

3 S.N. 1986, c.42.

provides for proof of debts by creditors and payment by the executor or administrator of an estate and, therefore, replacement legislation appears unnecessary. However, it is recommended that consideration be given to evaluating the state of Newfoundland law in regard to succession matters generally and, in particular, where a deceased has made inadequate provision for payment of creditors to the detriment of specific legatees.

4. Section 12 - Estates Per Autre Vie

> XII. And for the Amendment of the Law in the Particulars following; Be it further enacted by the Authority aforesaid, That from henceforth any Estate *per autre vie* shall be devisable by a Will in Writing, signed by the Party so devising the same, or by some other Person in his Presence and by his express Directions, attested and subscribed in the Presence of the Devisor by three or more Witnesses; and if no such Devise thereof be made, the same shall be chargeable in the Hands of the Heir, if it shall come to him by reason of a special Occupancy, as Assets by Descent, as in case of Lands in Fee-simple; and in case there be no special Occupant thereof, it shall go to the Executors or Administrators of the Party that had the Estate thereof by virtue of the Grant, and shall be Assets in their Hands.

The first part of section 12 establishes the right to devise estates *per autre vie*, provided that the devise is witnessed by at least 3 persons. Section 2 of the *Wills Act*[4] requires a minimum of two witnesses. The second part of section 12 of the Statute appears to codify existing law. It is similar to section 11 of the Statute in that the debts of the deceased are to be paid out of the deceased's estate and hence no personal liability attaches to an heir by devise. If, however, the deceased has not bequeathed such an estate, then it would appear that an heir takes subject to the deceased's obligations. It is recommended that section 12 of the Statute be repealed. However, the need to evaluate the law dealing with matters of succession remains as recommended earlier.

5. Sections 13 to 15 - Date on Which Judgments Bind Debtor's Lands

Sections 13 to 15 deal with the date on which common law judgments bind lands of a judgment debtor. A judgment lien originates with the *Statute of Westminster*,[5] and binds the lands of a judgment debtor. To perfect or realize on the judgment lien, the creditor could subsequently issue a writ of execution which extended to the debtor's lands. The subsequently issued writ, however, related back to the date of the judgment irrespective of when the writ may have bound if used independently.[6] As a result of this process for

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4 R.S.N. 1970, c.401.
5 (1285), 13 Edw.1.
6 Sections 13-15 of the *Statute* have not been litigated in Newfoundland. Were they to be litigated,

binding land *bona fide* purchasers for valuable consideration could be defeated by judgment liens even if they acquired their interest prior to execution under the writ. The customary writ of execution was the common law writ of elegit. It enabled the judgment creditor to be placed in possession of one-half of the debtor's lands and to apply any profits against the judgment debt. However, the land could not be sold under the writ of elegit. Of course, land was not exigible under the common law writ of *fieri facias* (fi fa).

At the time the *Statute of Frauds* was enacted, judgment creditors were not content with obtaining priority over *bona fide* purchasers who acquired their interest after the actual date of formal judgment. Judgments were being 'ante-dated' to an earlier time, such as the first day of the law term in which the action had been commenced. In so doing, creditors were advantaging themselves at the expense of *bona fide* purchasers. Section 13 of the Statute outlines the nature of the problem.

> XIII. And whereas it hath been found mischievous, that Judgments in the King's Courts of *Westminster* do many Times relate to the first Day of the Term whereof they are entred, or to the Day of the Return of the Original, or filing the Bail, and bind the Defendant's Lands from that Time, although in truth they were acknowledged or suffered and signed in the Vacation-time after the said Term, whereby many Times Purchasers find themselves aggrieved.

Sections 14 and 15 sought to redress the problem and read:

> IV. Be it enacted by the Authority aforesaid, That from and after the said four and twentieth Day of June any Judge or Officer of any of His Majesty's Courts of *Westminster*, that shall sign any judgments, shall at the signing of the same, without Fee for doing the same, set down the Day of the Month and Year of his so doing, upon the Paper Book, Docket or Record which he shall sign; which Day of the Month and Year shall be also entred upon the Margent of the Roll of the Record where the said Judgment shall be entred.
>
> XV. And be it enacted, That such Judgments as against Purchasers *bona fide* for valuable Consideration of Lands, Tenements or Hereditaments to be charged thereby, shall in Consideration of Law be Judgments only from such Time as they shall be so signed, and shall not relate to the first Day of the Term whereof they are entred, or the day of the Return

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it is arguable that they would be held not to apply under the *local conditions* exception of the reception of English law doctrine. Two reasons might be advanced: first, the provisions refer to Courts of Westminster, thus indicating that the intent was to limit their effect to the territory of England; and second, the sections deal with execution against freehold and prior to 1834 (*The Chattels Real Act*, 4 Wm. 4, c. 18) there was great debate in Newfoundland, largely as a result of *King William's Act, 1698*, 10 and 11 Wm. 3, c. 25, as to whether it was possible to have a freehold estate in the colony. See Reeves, *History of the Government of the Island of Newfoundland* 1791, at 130f.; *Dictionary of Canadian Biography*, Vol. VII at 301-304, entry for Sir Francis Forbes, Chief Justice of Newfoundland, 1817-1822; and *R.* v. *Kough* (1819), Nfld.L.R. 192. See also *Report on Section 9 of the Registration of Deeds Act*, *supra* n. 2 at 3f.

of the Original or filing the Bail; any Law, Usage or Course of any Court to the contrary notwithstanding.

The purpose of these sections is to prohbit the practice of *ante-dating* by requiring judgments to be dated as of *signing*, thereby providing a modicum of protection to *bona fide* purchasers. Sections 13 to 15 have been superceded by Rule 49.06 of the Rules of Court[7] which provides that a judgment takes effect from its *pronouncement*. Interestingly enough, the Rule expressly provides for 'ante' and 'post-dating' with approval of the Court. It must be remembered that even though the Rules of Court are considered subordinate legislation, they still override received English statutes, such as the *Statute of Westminster*, which form only the common law of the Province. Therefore, if the judgment lien exists in theory or in practice, the Rules of Court ensure generally that it does not attach until judgment is pronounced. It is therefore recommended that sections 13 to 15 inclusive of the Statute be repealed. In the circumstances outlined, replacement legislation is unnecessary.

6. Section 16 - Date on Which Writs of Execution Bind Debtor's Goods

XVI. And be it further enacted by the Authority aforesaid, That from and after the said four and twentieth Day of June no Writ of *Fieri facias* or other Writ of Execution shall bind the Property of the Goods against whom such Writ of Execution is sued forth, but from the Time that such Writ shall be delivered to the Sheriff, Under-Sheriff Coroners, to be executed: And for the better Manifestation of the Said Time, the Sheriff, Under-Sheriff and Coroners, their Deputies and Agents, or upon the Receipt of any such Writ, (without Fee for doing the same) endorse upon the Back thereof the Day of the Month or Year whereon he or they received the same.

While the common law permitted a judgment to have a limited binding effect on the debtor's lands, this was not the case in regard to goods against which a judgment creditor could issue a writ of *fieri facias* (fi fa) for the purpose of effecting a sale.[8] At this point, it is worth reproducing a portion of Professor La Forest's (as he then was) historical analysis of the development of the law surrounding the writ of *fi fa* and section 16 of the Statute:[9]

> At common law, the writ had effect from its teste. As soon as it was issued it bound the goods of the execution debtor into whosoever hands they came. So that if an execution debtor sold his goods after the issue of the writ, the execution creditor had a right to seize them even as against a *bona-fide* purchaser for value without notice. The English Statute of Frauds [1677, (29 Car.2), c.3, s.16] made an important alteration to this

7 See *Judicature Act*, S.N. 1986, c.42.

8 For a general discussion of execution against goods, see Newfoundland Law Reform Commission, *supra* n. 2 at 19f.

9 G.V. La Forest, "Some Aspects of the Writ of *Fieri Facias*" (1959), 12 U.N.B.L.J. 39, at p.40.

law. It provided, in effect, that the writ should not bind the goods of an execution debtor until it was delivered to the sheriff to be executed...

It should be observed that the provision in the Statute of Frauds merely postpones the time when the writ binds the goods of the execution debtor; it does not otherwise alter the law. So that if a judgment debtor sells goods to an innocent purchaser after the writ has been placed in the hands of the sheriff for execution, the sheriff may seize the goods in the hands of the innocent purchaser.

This blemish on the law was removed in England by section 1 of the Mercantile Law Amendment Act, 1856 [(19 & 20 Vict.), c.97, s.1], which provided that no writ of *fieri facias* should prejudice the right of any person to goods acquired from an execution debtor in good faith, for valuable consideration and without notice. This section and the provision of the Statute of Frauds just mentioned, were re-enacted by section 26 of the English Sale of Goods Act [1893 (56 & 57 Vict.), c.71].

In Newfoundland, the relevant provisions are section 28(1) of the *Sale of Goods Act*[10] and section 134 of the *Judicature Act* 1986. These provisions supersede section 16 and, therefore, a repeal is recommended. In light of existing legislation, replacement legislation is unnecessary.

7. Section 18 - Date on Which Recognizances Bind Debtor's Land

XVIII. And be it further enacted by the Authority aforesaid, That the Day of the Month and Year of the Enrolment of the Recognizances shall be set down in the Margent of the Roll where the said Recognizances are enroled; and that from and after the said four and twentieth Day of June no Recognizance shall bind any Lands, Tenements or Hereditaments in the Hands of any Purchaser *bona fide* and for valuable Consideration, but from the time of such Enrolment; any Law, Usage or course of any Court to the contrary in any wise notwithstanding.

As discussed earlier, sections 13 to 15 prohibit the practice of 'ante-dating' judgments to the advantage of judgment creditors and the detriment of purchasers of judgment debtors. Section 18 of the Statute seeks to achieve that result in regard to enrolment of recognizances. Today the concept of recognizance is restricted generally to criminal law matters. At the time of the enactment of the Statute, it was possible for a debtor to acknowledge a pre-existing debt obligation and to undertake payment before a court of record or magistrate. Once duly recorded, a recognizance bound the debtor's lands in the same manner as if judgment had been obtained and entered by the creditor. It is presumed that this procedure is no longer used or authorized and hence, it is recommended that section 18 be repealed. In the circumstances, replacement legislation is unnecessary.

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10 R.S.N. 1970, c.341.

CHAPTER 7

SALE OF GOODS - SECTION 17

> XVII. And be it further enacted by the Authority aforesaid, That from and after the said four and twentieth Day of June no Contract for the Sale of any Goods, Wares and Merchandizes, for the Price of ten Pounds Sterling or upwards, shall be allowed to be good, except the Buyer shall accept Part of the Goods so sold, and actually receive the same, or give something in earnest to bind the Bargain, or in Part of Payment or that some Note or *Memorandum* in Writing of the said Bargain be made and signed by the Parties to be charged by such Contract, or their Agents thereunto lawfully authorized.

Section 17 was amended by section 7 of the *Statute of Frauds Amendment Act*[1] of 1828 to extend to all contracts for the sale of goods not yet delivered, produced, or fit for delivery. Both provisions have been repealed implicitly by section 6 of the *Sale of Goods Act*:[2]

> 6.(1) A contract for the sale of any goods of the value of fifty dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.
>
> (2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

Express repeal of section 17 of the Statute of Frauds is recommended. At the same time, it must be acknowledged that the equivalent of section 6 of the *Sale of Goods Act* was repealed in England[3] in 1954, in British Columbia[4] in 1958 and in Manitoba[5] in 1983. The law reform commissions of Alberta[6] and Ontario[7] have recommended repeal of the successor sections to section 17 of the *Statute of Frauds*. That recommendation is supported, in part, on the observation that:[8]

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1 9 Geo. IV, c.14.
2 R.S.N. 1970, c.341.
3 *Law Reform (Enforcement of Contracts) Act*, 1954, 2 & 3 Eliz. II, c.34, s.2.
4 *Statute Law Amendment Act*, S.B.C. 1958, c.52, s.17.
5 *An Act to Repeal The Statute of Frauds*, S.M. 1982-83-84, c.34.
6 Alberta Institute of Law Research and Reform, Report No.44, *The Statute of Frauds and Related Legislation* (1985), at p.28.
7 Ontario Law Reform Commission, *Report on Sale of Goods* (1979).
8 Ontario Law Reform Commission, *Report on Amendment Of The Law Of Contract* (1987), at p.104.

> ...the repeal in the United Kingdom and other jurisdictions of what was formerly section 17 of the Statute of Frauds, relating to contracts for the sale of goods, does not appear to have had adverse effects and, so far as we have been able to ascertain, has not led to the difficulties usually associated with the absence of a writing.

It is recommended that consideration be given to repeal of section 6 of the *Sale of Goods Act*.

CHAPTER 8

STATUTE OF FRAUDS AMENDMENT ACT (1828) (LORD TENTERDEN'S ACT)

1. Introduction

The *Statute of Frauds Amendment Act*[1] of 1828 (Lord Tenterden's Act) consists of ten sections of which only two are presently in force in Newfoundland as part of its received law. The remaining sections have been either superseded by existing legislation or are simply inapplicable to the Province. While abrogation of the two extant provisions is recommended, the more difficult question pertains to the need for replacement legislation responsive to modern conditions. Section 6, which imposes that requirement in regard to actions based on misrepresentation as to another's credit worthiness, should be repealed. It is not difficult to argue convincingly against the need for replacement legislation. The other provision, section 2, touches on matters of pleading and requires both repeal and replacement legislation.

2. Section 1 - Acknowledgement of Statute Barred Debt

> In actions of debt or upon the case grounded upon any simple contract, no acknowledgement or promise by words only shall be deemed sufficient evidence of a new or continuing contract; whereby to take any case out of the operation of [21 Jac. 1, c. 16], or to deprive any party of the benefit thereof, unless Such acknowledgement or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors or executors or administrators of any contractor, no such joint contractor, executor or administrator shall lose the benefit of the said enactments or either of them, so as to be chargeable in respect or by reason only of any written acknowledgement or promise made and signed by any other or others of them: Provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever: Provided also, that in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial that the plaintiff, though barred by [21 Jac. 1, c. 16] or this Act, as to one or more joint contractors or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgement or promise or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff.

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1 9 Geo. IV, c.14 (hereafter the "Amending Act").

Section 1 of the *Amending Act* imposes a writing requirement in the event a debtor promises to pay a debt which is otherwise unenforceable because of a failure of the creditor to initiate proceedings within the prescribed limitation period. The equivalent of section 1 is found in section 5 of *The Limitation of Actions (Personal) and Guarantees Act*:[2]

> In any action for rent upon an indenture of demise, action upon any bond or other speciality, action upon any recognizance, and in all actions grounded upon any simple contract, no acknowledgement or promise by words only shall be deemed sufficient evidence of a new or continuing contract whereby to take any case out of the operation of Section 1 of this Act, or to deprive any party of the benefit thereof, unless such acknowledgement or promise shall be made or contained by or in some writing signed by the party chargeable thereby, or his agent; and when there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator, shall lose the benefit of Section 1 of this Act so as to be chargeable in respect or by reason only of any written acknowledgement or promise made or signed by any other or others of them: Provided that nothing herein contained shall alter or take away or lessen the effect of any payment of principal or interest made by any person whatever; and also, that in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial or otherwise, that the plaintiff, though barred by section 2 of this Act as to one or more of such joint contractors or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff.

It is clear that section 1 of the *Amending Act* has been repealed implicitly. Accordingly, express repeal is recommended. It is to be noted that section 5 of the Limitation of Actions makes specific reference to "the benefit of section 1" of that Act. However, section 1 of the *Limitations of Actions Act* merely describes the short title of the Act. It is recommended that section 5 of the that Act be reviewed to clarify the intended effect of that provision.

3. Section 2 - Abatement and Joinder of Parties

> And be it further enacted, that if any defendant or defendants in any action on any simple contract shall plead any matter in abatement, to the effect that any other person ought to be jointly sued, and issue be joined on such plea, and it shall appear at the trial that the action could not by reason of the said recited Acts or the Act or of either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same.

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2 R.S.N. 1970, c. 206. See Newfoundland Law Reform Commission, *Working Paper on Limitation of Actions* 1985 (NLRC-WP1) at 206f. and Appendix C at 380f.

Section 2 provides that a defendant who alleges that a third party should have been joined as a co-defendant, but the action is statute barred as against the third party then the joinder issue is to be resolved in favour of the plaintiff. There appears to be no superseding legislation in Newfoundland.[3] While repeal of section 2 is recommended, it is also recommended that the *Limitation of Actions Act* be amended to include a provision such as that found in section 15 of New Brunswick's *Limitations of Actions Act*.[4] That section provides:

> Where in any action on a contract the defence alleges that some person should have been sued jointly in the action, and issue is joined on such defence, and it appears that the action was, by reason of this Act, barred against such other person, the issue shall be found for the plaintiff.

4. Section 3 - Proof of Payment - Statute Barred Debt

> And be it further enacted, that no endorsement or memorandum of any payment written or made after the time appointed for this Act to take effect upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment so as to take the case out of the operation of either of the said statutes.

The purpose of this section is to render clear that where a money obligation has become statute barred, the mere fact that the obligor makes a notation that the obligee has made a subsequent payment, is not of itself sufficient proof of such, so as to defeat the prescribed limitation period and permit the creditor to maintain an action. Section 3 has been superseded by section 8 of *The Limitation of Actions (Personal) and Guarantees Act*. That section reads as follows:

> No endorsement or memorandum of any payment written or made upon any promissory note, bill of exchange, or any recognizance, bond, specialty, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment so as to take the case out of the operation of Section 2 of this Act.

Express repeal of section 3 of the *Amending Act* of 1828 is recommended.

5. Section 4 - Act Applies to Contract Alleged by Set-Off

> And be it further enacted, that the said recited acts and this act shall be deemed and taken to apply to the case of any debt on simple contract alleged by way of set-off on the part of any defendant, either by plea, notice or otherwise.

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3 See Newfoundland Law Reform Commission, *Working Paper on Limitation of Actions* 1985, Chapter 8 entitled "Pleadings and Procedural Problems," at 220f.

4 R.S.N.B. 1973, c.L-8.

Section 4 is reproduced in section 9 of *The Limitations of Actions (Personal) and Guarantees Act*. The latter section provides:

> This Act shall apply to the case of any debt on any specialty or any simple contract or otherwise, which may now or at any time hereafter by law be alleged by way of set-off on the part of any defendant, either by plea, notice or otherwise.

Express repeal of section 4 of the *Amending Act* of 1828 is recommended.

6. Section 5 - Ratification of Minors' Contracts

> And be it further enacted, that no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by same writing and signed by the party to be charged therewith.

Section 5 of the *Amending Act* of 1828 has been superseded by section 10 of *Limitation of Actions (Personal) and Guarantees Act*. The latter section provides:

> No action hereafter to be brought shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith.

While section 5 of the *Amending Act* has been superseded by the above provision, it is not sufficient to merely recommend express repeal of section 5. Consideration must be given to the possibility of repealing section 10 of the *Limitation of Actions (Personal) and Guarantees Act*. However, before such a recommendation could be acted upon, an analysis of the law relating to minors' contracts must be undertaken. In this regard, the Report on Minor's Contracts prepared by the Law Reform Commission of British Columbia[5] in 1976 is instructive as is the chapter prepared by the Ontario Law Reform Commission in its Report on Amendment Of The Law of Contract[6] released in 1987. Both Commissions had the benefit of the Alberta Report[7] released in 1975. For purposes of this discussion paper, it is sufficient to outline the position adopted by the Ontario Commission:[8]

> We have discussed the requirement, under section 7 of the Statute of Frauds [of Ontario] that ratification of minors' contracts be in writing.

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5 Law Reform Commission of British Columbia, *Report on Minor's Contracts* (1976).
6 Ontario Law Reform Commission, Report on Amendment of The law of Contract (1987).
7 Alberta Institute of Law Research and Reform, Report No. 14, Minor's Contracts (1975).
8 *Supra*, note 5 at p.203. Note, however, the ambivalent attitude of Newfoundland Courts as reflected in *Haynes* v. *Evans*, 15 Nfld.L.R. 416 and *Noseworthy* v. *Bell Island*, 12 Nfld.L.R. 212

In our view, this requirement is unduly rigid. In support of this view, we note that judicial interpretation of the requirement has tended to be very liberal, presumably in response to the injustice that would be caused by its strict application. Accordingly, we recommended that section 7 of the Statute of Frauds should be repealed.

7. Section 6 - Misrepresentation as to Credit Worthiness

> And be it further enacted, that no action shall be brought whereby to charge any person upon or by reason of any representation of assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith.

Section 6 of the *Amending Act* of 1828 was added; "to prevent circumvention of the writing requirement in section 4 involving contracts of guarantee. However, it is now firmly established that the section applies only to fraudulent representations concerning another's creditworthiness and does not affect actions in contract or actions for negligent misrepresentation."[9] What is of extreme significance is the fact that a defendant may, in law, shelter behind the Statute if the fraudulent representation has not been reduced to writing. In the circumstances, it is not surprising that provinces such as British Columbia[10] and Manitoba[11] have repealed the equivalent of section 6. Repeal has been recommended in Alberta[12] and Ontario.[13] It is recommended that section 6 be expressly repealed. In the circumstances, replacement legislation is not warranted.

8. Section 7 - Sale of Goods

This section is examined in Chapter 7 wherein express repeal is recommended.

9. Section 8 - Memorandum Not Subject To Stamp Duties

> And it be further enacted, that no memorandum or other writing made necessary by this act shall be deemed to be an agreement within the meaning of any statute relating to the Duties of Stamps.

It would appear that Newfoundland is of one of a few jurisdictions in which government fees may be paid by legal stamp. Admittedly, the *Stamp*

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9 *Ibid.*, at p.84, citing *Banbury* v. *Bank of Montreal*, [1918] A.C. 626 (H.L.) and *W.B. Anderson & Sons Ltd.* v. *Rhodes (Liverpool) Ltd.*, [1967] 2 All E.R. 850 (Q.B.).

10 Law Reform Amendment Act, S.B.C. 1985, c.10, s.8.

11 An Act to Repeal The Statute of Frauds, S.M. 1982-83-84, c.34.

12 Alberta Institute of Law Research and Reform, Report No.44, The Statute of Frauds and Related Legislation (1985) at p.53.

13 *Supra*, note 5, at p.85.

Act[14] expressly exempts certain instruments from its application, including deeds of conveyance (see section 6). As well, the *Stamp Act* is expressly stated to apply to a limited number of Statutes. Regardless of the present day application or relevance of the *Stamp Act*, it is clear that section 8 of the *Amending Act* has been superseded by the former. Express repeal is recommended.

10. Sections 9 And 10 - Miscellaneous Provisions

Section 9 of the *Amending Act* provides that it does apply to Scotland and is obviously inapplicable. Section 10 provides that the Amending Act does not take effect until January 1, 1829. In light of earlier recommendations, express repeal of both sections is inevitable. Accordingly, express repeal is recommended.

14 R.S.N. 1970, c.361.

CHAPTER 9

SUMMARY OF RECOMMENDATIONS

1. Introduction

It must be emphasized that the following recommendations represent the views of the author and not that of the Commission. The first step in the reform process is to enact specific legislation abrogating the *Statute of Frauds* of 1677 and the *Amendment Act* of 1828. The next step is to determine the need for replacement legislation with respect to those provisions which have not been superseded by existing legislation.

2. The Contracts Provision - Section 4

Section 4 of the Statute imposes a writing requirement with respect to enforcement of the following contracts: (1) promise by executor to answer for damages; (2) agreement made upon consideration of marriage; (3) contracts not to be performed within a year; (4) contracts of guarantee; and (5) contracts for the sale of land. The first three categories are recognized universally as anachronisms and therefore no replacement legislation is recommended. While retention of the writing requirement for contracts of guarantee is recommended, and to be extended to contracts of indemnity, it is further recommended that consideration be given to enacting consumer protection legislation which transcends the limited purposes served by a writing requirement. In regard to land contracts, replacement legislation is not recommended. The author acknowledges the controversial nature of such a change in law and therefore examines other reform possibilities. The first involves a reformulation of the writing requirement, and as well, the exemption accorded by the doctrine of part performance, with a view to eliminating existing deficiencies in the law. However, that option is not preferred to the one advocated by the Ontario Law Reform Commission which recommended that a contract relating to land not be enforceable unless the plaintiff's testimony is corroborated by other material evidence.

3. Conveyances of Interests in Land - Sections 1-3

Sections 1 and 3 of the Statute require that a conveyance of an estate or interest in land be in writing. Section 2 excepts oral leases which do not exceed three years and the rent is not less than a specified amount. With respect to conveyances, it was concluded that abrogation of the writing requirement would not validate oral conveyances of freehold estates (other than by feoffment with livery of seisin), including so-called gifts of land, and therefore no pressing reason could be advanced for recommending replacement legislation. As a practical matter, however, written conveyances are required of those who in future wish to establish a marketable title to their

lands or to defeat claims of third parties who have complied with the provisions of the *Registration of Deeds Act*. Ultimately, it is recommended that a liberalized writing requirement be imposed, if only to promote consistency with the objectives of the registry system. The replacement legislation need be no more elaborate than the following: "a conveyance of an estate or interest in land shall be in writing."

The writing requirement in regard to leasehold estates proved problematic, principally because the issue of permitting oral leases cannot be resolved without first determining the enforceability of oral agreements for lease. Presently, such contracts fall under section 4 of the Statute discussed above. Without knowing the reform solution to be chosen in that context, it would be unproductive to speculate on the reform needed in regard to oral or written leases. The author also examined corrolary issues arising from the enforceability of oral leases as between the immedite parties and as between lessees and third parties who take without notice of prior unregistered instruments within the context of the *Registration of Deeds Act*.

The most controversial aspect of the Discussion Paper is with respect to the argument that conveyancing documents in the Province are ineffective for transferring freehold estates to land. The author argues that the *Chattels Real Act* does not support present conveyancing practices.

4. Trusts of Land - Sections 7-9

Section 7 of the Statute renders unenforceable any declaration or creation of trusts of interests in land, unless in writing. Section 8 exempts trusts which arise by implication or construction of law; that is resulting and constructive trusts. Finally, section 9 provides that all assignments of trusts be in writing. No replacement legislation is recommended. Inevitably, oral trusts fall within the exemption provided by section 8 of the Statute. In the circumstances, nothing would be achieved by advocating reenactment.

5. Wills and Probate - Sections 5, 6 and 19-25

All of the above sections has been superseded by existing legislation and therefore only express repeal is required. However, that recommendation does not preclude the need to reevaluate existing statutory provisions in the area of wills and probate.

6. Debtor and Creditor - Sections 10-16 and 18

In light of the Commission's *Report on Section 9 of the Registration of Deeds Act,* it was agreed that the Discussion Paper should offer a limited analysis. Some provisions of the Statute can be repealed without having a negative effect on the law of the Province and hence replacement legislation is not recommended. Other provisions have been superseded by existing

legislation or will be rendered irrelevant once recommendations of the Commission are implemented. However, it was noted that so far as the debtor-creditor provisions touch on matters of succession, a reevaluation of existing statutory law is warranted. This recommendation is consistent with that offered above in regard to those provisions relevant to wills and probate.

7. Sale of Goods - Section 17

Section 17 of the Statute, which imposes a writing requirement in regard to certain contracts for the sale of goods, has been superseded by section 6 of the *Sale of Goods Act*. Though replacement legislation is unnecessary, it is recommended that consideration be given to abrogation of the writing requirement imposed by the *Sale of Goods Act*.

8. Statute of Frauds Amendment Act (1828)

Of the ten sections outlined in the *Amendment Act* of 1828, all but two have been superseded by existing legislation. Section 2 touches on a matter involving joinder of a party who successfully invokes the *Limitations of Actions (Personal) and Guarantees Act*. Replacement legislation is recommended. Section 6 imposes a writing requirement with respect to a bringing action for misrepresentation as to another's creditworthiness. Since it has been judicially determined that the section does not apply to actions brought in contract or for negligent misrepresentations, it is necessarily restricted to fraudulent misrepresentations. Replacement legislation is unwarranted. A defendant should not be able to plead the Statute of Frauds where the allegation is one of fraud itself. Though section 5 of the Amending Act has been superseded by existing legislation, the topic of ratification of minors' contracts, including the writing requirement, is deserving of future consideration and it is so recommended.

APPENDIX A

Anno 29 Car. II. c. 3, 1676

An Act for Prevention of Frauds and Perjuries

'For prevention of many fraudulent Practices, which are commonly endeavoured to be upheld by Perjury and Subornation of Perjury,' Be it enacted by the King's Most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the Authority of the same, That from and after the four and twentieth Day of June, which shall be in the Year of our Lord One thousand six hundred seventy and seven, all Leases, Estates, Interests of Freehold, or Terms of Years, or any uncertain Interest of, in, to or out of any Messauges, Manors, Lands, Tenements or Hereditaments, made or created by Livery and Seisin only, or by Parol, and not put in Writing, and signed by the Parties so making or creating the same, or their Agents thereunto lawfully authorized by Writing, shall have the Force and Effect of Leases or Estates at Will only and shall not either in Law or Equity be deemed or taken to have any other or greater Force or Effect; any Consideration for making any such Parol Leases or Estates, or any former Law or Usage, to the contrary notwithstanding.

II. Except nevertheless all Leases not exceeding the Term of three Years from the making thereof, whereupon the Rent reserved to the Landlord, during such Term, shall amount unto two-third Parts at least of the full improved Value of the Thing demised.

III. And moreover, That no leases, Estates or Interests, either of Freehold, or Terms of Years, or any uncertain Interest, not being Copyhold or customary Interest, of, in, to or out of any Messuages, Manors, Lands, Tenements or Hereditaments, shall at any Time after the said four and twentieth; Day of June be assigned, granted or surrendred, unless it be by Deed or Note in Writing, signed by the Party so assigning, granting or surrendring the same, or their Agents thereunto lawfully authorized by Writing, or by Act and Operation of Law.

IV. And be it further enacted by the Authority aforesaid, That from and after the said four and twentieth Day of June no Action shall be brought whereby to charge any Executor or Administrator upon any special Promise, to answer Damages out of his own Estate; or whereby to charge the Defendant upon any special Promise to answer for the Debt, Default or Miscarriages of another Person; or to charge any Person upon any Agreement made upon Consideration of Marriage; or upon any contract or Sale of Lands, Tenements or Hereditaments, or any Interest in or concerning them; or upon any Agreement that is not to be performed within the Space of one Year from the making thereof; unless the Agreement upon which such Action shall be brought, or some Memorandum or Note thereof, shall be in Writing,

and signed by the Party to be charged therewith, or some other Person thereunto by him lawfully authorized.

V. And be it further enacted by the Authority aforesaid, That from and after the said four and twentieth Day of June all Devises and Bequests of any Lands or Tenements, devisable either by Force of the Statute of Wills, or by this Statute, or by Force of the Custom of Kent, or the Custom of any Borough, or any other particular Custom, shall be in Writing, and signed by the Party so devising the same, or by some other Person in this Presence and by his express Directions, and shall be attested and subscribed in the Presence of the said Devisor by three or four credible Witnesses, or else they shall be utterly void and of none Effect. [This Section explained 25 G.2.c.6.]

VI. And moreover, No Devise in Writing of Lands, Tenements or Hereditaments, nor any Clause thereof, shall at any Time after the said four and twentieth Day of June be revocable, otherwise than by some other Will or Codicil in Writing, or other Writing declaring the same, or by burning, cancelling, tearing or obliterating the same by the Testator himself, or in his Presence and by his Directions and Consent; but all Devises and Bequests of Lands and Tenements shall remain and continue in Force, until the same be burnt, cancelled, torn or obliterated by the Testator, of his Directions, in Manner aforesaid, or unless the same be altered by some other Will or Codicil in Writing, or other Writing of the Devisor signed in the Presence of three or four Witnesses, declaring the same; any former Law or Usage to the contrary notwithstanding.

VII. And be it further enacted by the Authority aforesaid, That from and after the said four and twentieth Day of June all Declarations or Creations of Trusts or Confidences of any Lands, Tenements or Hereditaments, shall be manifested and proved by some Writing signed by the Party who is by Law enabled to declare such Trust, or by his last Will in Writing or else they shall be utterly void and of none Effect.

VIII. Provided always, That where any Conveyance shall be made of any Lands or Tenements by which a Trust or Confidence shall or may arise or result by the Implication or Construction of Law, or be transferred or extinguished by an Act or Operation of Law, then and in every such Case such Trust or Confidence shall be of the like Force and Effect as the same would have been if this Statute had not been made; any Thing herein before contained to the contrary notwithstanding. [Explained by 4 Ann. c. 16 ss. 15.]

IX. And be it further enacted, That all Grants and Assignments of any Trust or Confidence shall likewise be in Writing, signed by the Party granting or assigning the same, or by such last Will or Devise, or else shall likewise be utterly void and of none Effect.

X. And be it further enacted by the Authority aforesaid, That from and after the said four and twentieth Day of June it shall and may be lawful for

every Sheriff or other Officer to whom any Writ or Precept is or shall be directed, at the Suit of any Person or Persons, of, for and upon any Judgment, Statute or Recognizance hereafter to be made or had, to do, make and deliver Execution unto the Party in that Behalf suing, of all such Lands, Tenements,, Rectories, Tithes, Rents and Hereditaments, as any other Person or Persons be in any Manner of wise seised or possessed, or hereafter shall be seised or possessed, in trust for him against whom Execution is so sued, like as the Sheriff or other Office might or ought to have done, if the said Party against whom Execution hereafter shall be so sued, had been seised of such Lands, Tenements, Rectories, Tithes, Rents or other Hereditaments of such Estate as they be seised of in trust for him at the Time of the said Execution sued; which Lands, Tenement, Rectories, Tithes, Rents and other Hereditaments, by force and virtue of such Execution, shall accordingly be held and enjoyed freed and discharged from all Incumbrances of such Person and or Persons as shall be so seised or possessed in trust for the person against whom such Execution shall be sued; and if any *Cestuy que Trust* hereafter shall die, leaving a Trust in Fee-simple to descend to his Heir, there and in every such Case such Trust shall be deemed and taken, and is hereby declared to be, Assets by Descent, and the Heir shall be liable to and chargeable with the Obligation of his Ancestors for and by reason of such Assets, as fully and amply as he might or ought to have been, if the Estate in Law had descended to him in Possession in like Manner as the Trust descended; any Law, Custom or Usage to the contrary in any wise not withstanding.

XI. Provided always, That no Heir that shall become chargeable by reason of any Estate or Trust made Assets in his hands by this Law, shall be reason of any Kind of Plea or Confession of the Action, or suffering Judgment by *Nient dedire*, or any other Matter, be chargeable to pay the Condemnation out of his own Estate; but Execution shall be sued of the whole Estate so made Assets in his Hands by Descent, in whole Hands soever it shall come after the Writ purchased, in the same Manner as it is to be at and by the common Law, where the Heir at Law pleading a true Plea, Judgment is prayed against him thereupon; any Thing in this present Act contained to the contrary notwithstanding.

XII. And for the Amendment of the Law in the Particulars following; Be it further enacted by the Authority aforesaid, That from henceforth any Estate *pur autre vie* shall be devisable by a Will in Writing, signed by the Party so devising the same, or by some other Person in his Presence and by his express Directions, attested and subscribed in the Presence of the Devisor by three or more Witnesses; and if no such Devise thereof be made, the same shall be chargeable in the Hands of the Heir, if it shall come to him by reason of a special Occupancy, as Assets by Descent, as in case of Lands in Fee-simple; and in case there be no special Occupant thereof, it shall go to the Executors or Administrators of the Party that had the Estate thereof by

virtue of the Grant, and shall be Assets in their Hands. [See 14 G.2.c.20 ss.9.]

XIII. 'And whereas it hath been found mischievous, that Judgments in the King's Courts at *Westminster* do many Times relate to the first Day of the Term whereof they are entred, or to the Day of the Return of the Original, or filing the Bail, and bind the Defendant's Lands from that Time, although in truth they were acknowledged or suffered and signed in the Vacation-time after the said Term, whereby many Times Purchasers find themselves aggrieved:'

XIV. Be it enacted by the Authority aforesaid, That from and after the said four and twentieth Day of June any Judge or Officer of any of His Majesty's Courts of *Westminster*, that shall sign any Judgments, shall at the signing of the same, without Fee for doing the same, set down the Day of the Month and Year of his so doing, upon the Paper Book, Docket or Record which he shall sign; which Day of the Month and Year shall be also entred upon the Margent of the Roll of the Record where the said Judgment shall be entred. [Extended to Courts of Great Session and Counties Palantine 8 G.I.c.25 ss.6.]

XV. And be it enacted, That such Judgments as against Purchasers *bona fide* for valuable Consideration of Lands, Tenements or Hereditaments to be charged thereby, shall in Consideration of Law be Judgments only from such Time as they shall be so signed, and shall not relate to the first Day of the Term whereof they are entred, or the Day of the Return of the Original or filing the Bail; any Law, Usage or Course of any Court to the contrary notwithstanding.

XVI. And be it further enacted by the Authority aforesaid, That from and after the said four and twentieth Day of June no Writ of *Fieri facias* or other Writ of Execution shall bind the Property of the Goods against whom such Writ of Execution is sued forth, but from the Time that such Writ shall be delivered to the Sheriff, Under-Sheriff and Coroners, to be executed: And for the better Manifestation of the said Time, the Sheriff, Under-Sheriff and Coroners, their Deputies and Agents, shall upon the Receipt of any such Writ, (without Fee for doing the same) endorse upon the Back thereof the Day of the Month or Year whereon he or they received the same.

XVII. And be it further enacted by the Authority aforesaid, That from and after the said four and twentieth Day of June no Contract for the Sale of any Goods, Wares and Merchandizes, for the Price of ten Pounds Sterling or upwards, shall be allowed to be good, except the Buyer shall accept Part of the Goods so sold, and actually receive the same, or give something in earnest to bind the Bargain, or in Part of Payment or that some Note or *Memorandum* in Writing of the said Bargain be made and signed by the Parties to be charged by such Contract, or their Agents thereunto lawfully authorized.

XVIII. And be it further enacted by the Authority aforesaid, That the Day of the Month and Year of the Enrolment of the Recognizances shall be set down in the Margent of the Roll where the said Recognizances are enrolled; and that from and after the said four and twentieth Day of June no Recognizance shall bind any Lands, Tenements or Hereditaments in the Hands of any Purchaser *bona fide* and for valuable Consideration, but from the time of such Enrolment; any Law, Usage or Course of any Court to the contrary in any wise notwithstanding.

XIX. 'And for Prevention of fraudulent Practices in setting up Nuncupative Wills, which have been the Occasion of much Perjury;' Be it enacted by the Authority aforesaid, That from and after the aforesaid four and twentieth Day of June no Noncupative Will shall be good, where the Estate thereby bequeathed shall exceed the Value of thirty Pounds, that is not proved by the Oaths of three Witnesses (at the least) that were present at the making thereof; nor unless it be proved that the Testator at the Time of pronouncing the same, did bid the Persons present, or some of them, bear Witness, that such was his Will, or to that Effect; nor unless such Nuncupative Will were made in the Time of the last Sickness of the Deceased, and in the House of his or her Habitation or Dwelling, or where he or she hath been resident for the Space of ten Days or more next before the making of such Will, except where such Person was surprized or taken sick, being from his own Home, and died before he returned to the Place of his or her Dwelling. [This section explained 4 Ann. c.16. ss.14.]

XX. And be it further enacted, That after six Months passed after the speaking of the pretended Testamentary Words, no Testimony shall be received to prove any Will Nuncupative, except the said Testimony, or the Substance thereof, were committed to Writing within six Days after the making of the said Will.

XXI. And be it further enacted, That no Letters Testamentary or Probate of any Nuncupative Will shall pass the Seal of any Court, till fourteen Days at the least after the Decease of the Testator be fully expired; nor shall any Nuncupative Will be at any Time received to be proved, unless Process have first issued to call in the Widow, or next of Kindred to the Deceased, to the End they may contest the same if they please.

XXII. And be it further enacted, That no Will in Writing concerning any Goods or Chattels, or Personal Estate, shall be repealed, nor shall any Clause, Devise, or Bequest therein, be altered or changed by any Words, or Will by Word of Mouth only, except the same be in the Life of the Testator committed to Writing, and after the Writing thereof read unto the Testator, and allowed by him, and proved to be so done by three Witnesses at the least.

XXIII. Provided always, That notwithstanding this Act, any Soldier being in actual military Service, or any Mariner or Seaman being at Sea, may

dispose of his Moveables, Wages and Personal Estate, as he or they might have done before the making of this Act.

XXIV. And it hereby declared, That nothing in this Act shall extend to alter or change the Jurisdiction or Right of Probate of Wills concerning personal Estates, but that the Prerogative Court of the Archbishop of *Canterbury*, and other Ecclesiastical Courts, and other Courts having Right to the Probate of such Wills, shall retain the same Right and Power as they had before, in every respect; subject nevertheless to the Rules and Directions of this Act.

XXV. And for the explaining one Act of this present Parliament, intituled, *An Act for the better Settling of Intestates Estates*; Be it declared by the Authority aforesaid, That neither the said Act, nor any Thing therein contained, shall be construed to extend to the Estates of Feme Coverts that shall die Intestate, but that their Husbands may demand and have Administration of their Rights, Credits, and other personal Estates, and recover and enjoy the same, as they might have done before the making of the said Act.

APPENDIX B

9 George IV, C. XIV

An Act for rendering a written memorandum necessary to the Validity of certain Promises and Engagements.

Whereas by an Act passed in *England* in the Twenty-first Year of the Reign of King *James* the First, it was, among other Things, enacted, that all Actions of Account and upon the Case, other than such Accounts as concern the Trade of Merchandise between Merchant and Merchant, their Factors or Servants, all Actions of Debt grounded upon any Lending or Contract without Specialty, and all Actions of Debt for Arrearages of Rent, should be commenced within Three Years after the End of the then present Session of Parliament, or within Six Years next after the Cause of such Actions or Suite, and not after: And Whereas a similar Enactment is contained in an Act passed in *Ireland* in the Tenth Year of the Reign of King *Charles* the First: And Whereas various Questions have arisen in Actions founded on Simple Contract, as to the Proof and effect of Acknowledgments and Promises offered in Evidence for the Purpose of taking Cases out of the Operation of the said Enactments; and it is expedient to prevent such Questions, and to make Provision for giving effect to the said Enactments and to the Intention thereof: Be it therefore enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That in Actions of Debt or upon the Case grounded upon any Simple Contract no Acknowledgment or Promise by Words only shall be deemed sufficient Evidence of a new or continuing Contract, whereby to take any Case out of the Operation of the said Enactments or either of them, or to deprive any Party of the Benefit thereof, unless such Acknowledgment or Promise shall be made or contained by or in some Writing to be signed by the Party chargeable thereby; and that where there shall be Two or more Joint Contractors, or Executors or Administrators of any Contractor, no such Joint Contractor, Executor, or Administrator shall lose the Benefit of the said Enactments or either of them, so as to be chargeable in respect or by reason only of any written Acknowledgment or Promise made and signed by any other or others of them: Provided always, that nothing herein contained shall alter or take away or lessen the Effect of any Payment of any Principal or Interest made by any Person whatsoever: Provided also, that in Actions to be commenced against Two or more such Joint Contractors, or Executors or Administrators, if it shall appear at the Trial or otherwise that the Plaintiff, though barred by either of the said recited Acts or this Act, as to One or more of such Joint Contractors, or Executors or Administrators, shall nevertheless be entitled to recover against any other or others of the Defendants, by virtue of a new Acknowledgment or Promise, or otherwise, Judgment may be given and Costs allowed for the

Plaintiff as to such Defendant or Defendants against whom he shall recover, and for the other Defendant or Defendants against the Plaintiff.

II. And be it further enacted, That if any Defendant or Defendants in any Action on any Simple Contract shall plead any Matter in Abatement, to the Effect that any other Person or Persons ought to be jointly sued, and Issue be joined on such Plea, and it shall appear at the Trial that the Action could not, by reason of the said recited Acts or this Act, or of either of them, be maintained against the other Person or Persons named in such Plea, or any of them, the Issue joined on such Plea shall be found against the Party pleading the same.

III. And be it further enacted, That no Indorsement or Memorandum of any Payment written or made after the Time appointed for this Act to take effect, upon any Promissory Note, Bill of Exchange, or other Writing, by or on the Behalf of the Party to whom such Payment shall be made, shall be deemed sufficient Proof of such Payment, so as to take the Case out of the Operation of either of the said Statutes.

IV. And be it further enacted, That the said recited Acts and this Act shall be deemed and taken to apply to the Case of any Debt on Simple Contract alleged by way of Set-off on the Part of any Defendant, either by Plea, Notice, or otherwise.

V. And be it further enacted, That no Action shall be maintained whereby to charge any Person upon any Promise made after full Age to pay any Debt contracted during Infancy, or upon any Ratification after full Age of any Promise or Simple Contract made during Infancy, unless such Promise or Ratification shall be made by some Writing signed by the Party to be charged therewith.

VI. And be it further enacted, That no Action shall be brought whereby to charge any Person upon or by reason of any Representation or Assurance made or given concerning or relating to the Character, Conduct, Credit, Ability, Trade, or Dealings of any other Person, to the Intent or Purpose that such other Person may obtain Credit, Money, or Goods upon [sic], unless such Representation or Assurance be made in Writing, signed by the Party to be charged therewith.

VII. And Whereas by an Act passed in *England* in the Twenty-ninth Year of the Reign of King *Charles* the Second, intituled *An Act for the Prevention of Frauds and Perjuries*, it is, among other Things, enacted, that from and after the Twenty-fourth Day of *June* One thousand six hundred and seventy-seven, no Contract for the Sale of any Goods, Wares, and Merchandises, for the Price of Ten Pounds Sterling or upwards, shall be allowed to be good, except the Buyer shall accept Part of the Goods so sold, and actually receive the same, or give something in earnest to bind the Bargain, or in part of Payment, or that some Note or Memorandum in Writing of the said Bargain be made and signed by the Parties to be charged by such Contract,

or their Agents thereunto lawfully authorized: And whereas a similar Enactment is contained in an Act passed in *Ireland* in the Seventh Year of the Reign of King *William* the Third: And Whereas it has been held, that the said recited Enactments do not extend to certain Executory Contracts for the Sale of Goods, which nevertheless are within the Mischief thereby intended to be remedied; and it is expedient to extend the said Enactments to such Executory Contracts; Be it enacted, That the said Enactments shall extend to all Contracts for the Sale of Goods of the Value of Ten Pounds Sterling and upwards, notwithstanding the Goods may be intended to be delivered at some future Time, or may not at the Time of such Contract be actually made, procured, or provided, or fit or ready for Delivery, or some Act may be requisite for the making or completing thereof, or rendering the same fit for Delivery.

VIII. And be it further enacted, That no Memorandum or other Writing made necessary by this Act shall be deemed to be an Agreement within the Meaning of any Statute relating to the Duties of Stamps.

IX. And be it further enacted, That nothing in this Act contained shall extend to *Scotland*.

X. And be it further enacted, That this Act shall commence and take effect on the First Day of *January* One thousand eight hundred and twenty-nine.